LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 29 19[illegible]
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-964

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

PAUL D. WARE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JAMES T. RANNEY,
Assistant District Attorney,
MILTON M. STEIN,
Assistant District Attorney,
Chief, Appeals Division,
JAMES D. CRAWFORD,
Deputy District Attorney,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

Room 666, City Hall
Philadelphia, Pa. 19107

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 13

I. The Pennsylvania Supreme Court Has Improperly Held That Decisions of This Court Compel It To Apply Miranda v. Arizona, 384 U. S. 436 (1966), To a Case Where the Questioning Occurred Before the Miranda Decision (Although the Trial Was Fortuitously Delayed Until After Miranda) Since:

1. The "Trial-Date" Language in Johnson v. New Jersey, 384 U. S. 719 (1966), was Inadvertent, Unrequired by the Facts of That Case and Not Involved in Briefing or Argument of That Case;

2. Even if This Language Had Been a Considered Choice Between a "Trial-Date" and an "Activity-Date" Cut-Off Rule for Retroactivity Purposes, it Has Never Been Suggested by Any Court that a "Trial-Date" Rule of Prospectivity is Constitutionally Required;

3. In Later Cases Where This Court Eventually Did Make a Considered Choice Between a "Trial-Date" Rule and an "Activity-Date" Rule for Setting a Retroactivity Cut-Off Date, This Court Has Consistently Adopted an "Activity-Date" Rule; and

PAGE

4. An "Activity-Date" Rule is Eminently Preferable in View of (a) the Purposes of Miranda, Which Would in No Way be Furthered by Applying its Strictures to a 1963 Confession; (b) the Reliance by Police Officers (the Very Persons Who Must Enforce the Law on a Day-to-Day Basis) on Pre-Miranda Law; and (c) the Demoralizing Effect of Setting Free a Confessed Four-Time Murderer Needlessly and Continuing the Release of Countless Other Confessed Criminals Due to the Anomalous "Trial-Date" Rule 13

II. As a Result of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. Sec. 3501 (b), Respondent's Clearly Voluntary Confessions Should Properly Be Admissible At His Trial ... 27

Conclusion 32

Appendix 33

A. Opinion and Order of the Hon. D. Donald Jamieson, Court of Common Pleas, entered December 11, 1969 33

B. Opinion and Order of the Hon. Robert N. C. Nix, Jr., Court of Common Pleas, entered June 19, 1970 38

C. Opinion and Order of the Hon. Robert N. C. Nix, Jr., Court of Common Pleas, entered November 13, 1970 44

D. Opinion and Judgment of the Pennsylvania Supreme Court, filed December 20, 1971 69

E. Selected Portions of Committee Report, P. L. 90-351, Title II, 1968 U. S. Code Congressional and Administrative News 2112 76

TABLE OF CITATIONS

PENNSYLVANIA CASES: PAGE

Commonwealth v. Bennett, 439 Pa. 34 (1970) ... 16, 29
Commonwealth v. Bordner, 432 Pa. 405 (1968) 15
Commonwealth v. Davis, 440 Pa. 123 (1970) 16
Commonwealth v. Dixon, 432 Pa. 423 (1968) 15
Commonwealth v. Leaming, 432 Pa. 326 (1968) 15
Commonwealth v. Robinson, 428 Pa. 458 (1968) ... 15
Commonwealth v. Schmidt, 423 Pa. 432 (1966) 16
Commonwealth v. Singleton, 439 Pa. 185 (1970). ... 16
Commonwealth v. Sites, 427 Pa. 486 (1967) 15
Commonwealth v. Ware, 438 Pa. 517 (1970) 16
Commonwealth v. Ware, —— Pa. —— (1971) 16
Commonwealth v. Williams, 432 Pa. 557 (1968) .. 15, 16
Commonwealth v. Willman, 434 Pa. 489 (1969) 16
Commonwealth v. Yount, 435 Pa. 276 (1969) 16

FEDERAL CASES:

Baines v. United States, 426 F. 2d 833 (5th Cir. 1970) 17
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U. S. 388 (1971) 31
Bloom v. Illinois, 391 U. S. 194 (1968) 21
Bolling v. Sharpe, 347 U. S. 497 (1954) 29
Camacho v. United States, 407 F. 2d 39 (9th Cir. 1969) 17
Chimel v. California, 395 U. S. 752 (1969) 19
Coolidge v. New Hampshire, 403 U. S. 443 (1971) .. 31

PAGE

Desist v. United States, 394 U. S. 244 (1969) 19, 20, 22, 23

DeStefano v. Woods, 392 U. S. 631 (1968) 21

Duncan v. Louisiana, 391 U. S. 145 (1968) 21

Escobedo v. Illinois, 378 U. S. 478 (1964) ...15, 17, 18, 22

Evans v. United States, 375 F. 2d 355 (8th Cir. 1967) 17

Frazier v. Cupp, 394 U. S. 731 (1969) 15

Gilbert v. California, 388 U. S. 263 (1967) 20

Griffin v. California, 380 U. S. 609 (1965) 20

Griffith v. Jones, 283 F. Supp. 794 (N. D. Ga. 1967) .. 17

Groshart v. United States, 392 F. 2d 172 (9th Cir. 1968) 17

Grosso v. United States, 390 U. S. 62 (1968) 21

Harris v. New York, —— U. S. ——, 91 S. Ct. 643 (1971) 15, 25

Jenkins v. Delaware, 395 U. S. 213 (1969) 15, 16, 19, 23, 24

Johnson v. New Jersey, 384 U. S. 719 (1966) 13, 14, 15, 16, 17, 18, 19, 24, 25, 26

Katz v. United States, 389 U. S. 347 (1967) 20

Linkletter v. Walker, 381 U. S. 618 (1965)...15, 16, 19, 24

Mackey v. United States, —— U. S. ——, 91 S. Ct. 1160 (1971) 21

Marchetti v. United States, 390 U. S. 39 (1968) 21

Miranda v. Arizona, 384 U. S. 436 (1966) 2, 5, 7, 9, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

O'Connor v. Ohio, 385 U. S. 92 (1966) 20

Posey v. United States, 416 F. 2d 545 (5th Cir. 1969) 17

Price v. Georgia, 398 U. S. 323 (1970) 31

PAGE

Rochin v. California, 342 U. S. 165 (1952) 31

Rolland v. People of State of Michigan, 320 F. Supp. 1195 (E. D. Mich. 1970) 17

Rowe v. Peyton, 383 F. 2d 709 (4th Cir. 1967), aff'd, 391 U. S. 54 (1968) 20

Sheer v. United States, 414 F. 2d 122 (5th Cir. 1969) 17

Smith v. Peyton, 295 F. Supp. 1379 (W. D. Va. 1968) 17

Stovall v. Denno, 388 U. S. 293 (1967) 16, 19, 20

United States v. Chaplin, 435 F. 2d 320 (2d Cir. 1970) 17

United States v. Dickerson, 413 F. 2d 1111 (7th Cir. 1969) 20

United States v. Fox, 403 F. 2d 97 (2d Cir. 1968) 16

United States v. Vanterpool, 394 F. 2d 697 (2d Cir. 1968) 16

United States v. Wade, 388 U. S. 218 (1967) 20

United States v. White, 417 F. 2d 89 (2d Cir. 1969) .. 26

Williams v. United States, —— U. S. ——, 91 S. Ct. 1148 (1971) 19

OTHER STATES:

Clark v. Smith, 164 S. E. 2d 790 (Ga. 1968) 18

Commonwealth v. Bujnowski, 267 N. E. 2d 924 (Mass. App. 1971) 17

Flowers v. State, 168 N. W. 2d 843 (Wis. 1969) 18

Guyette v. State, 438 P. 2d 244 (Nev. 1968) 18

Mora v. People, 481 P. 729 (Colo. 1971) 17

Penn v. Commonwealth, 169 S. E. 2d 427 (Va. 1969) .. 18

People v. Kilduff, 276 N. Y. S. 2d 814 (N. Y. Co. Ct. 1966) 18

PAGE

People v. P, 233 N. E. 2d 255 (N. Y. App. 1967) 18

People v. Peacock, 287 N. Y. S. 2d 166 (N. Y. App. 1968) 18

People v. Tucker, 172 N. W. 2d 712 (Mich. App. 1969). 18

People v. Welborn, 82 Cal. Rptr. 845 (Cal. App. 1969) 17

State v. Anderson, 229 So. 2d 329 (La. 1969) 17

State v. Brown, —— A. 2d ——, 279 A. 2d 554 (Conn. 1971) 20

State v. Butler, 249 N. E. 2d 818 (Ohio 1969) 18

State v. Gannites, 221 A. 2d 620 (R. I. 1966) 19

State v. Knott, 249 A. 2d 421 (R. I. 1969) 18

State v. Lewis, 164 S. E. 2d 177 (N. C. 1968) 18

State v. Mendes, 210 A. 2d 50 (R. I. 1964) 19

State v. Travis, 231 A. 2d 205 (N. J. 1967) 18, 26

State v. Wong, 430 P. 2d 330 (Hawaii 1967) 17

Young v. State, 234 So. 2d 341 (Fla. 1970) 17

MISCELLANEOUS:

Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting," 51 Marq. L. Rev. 254 (1968) 21

Graham, "Bar Speakers Critical of Warren Court," The New York Times, p. 1, col. 3 (July 17, 1971) 26

Johnson, The Supreme Court of California, 1967-1968: Foreword: Retroactivity in Retrospect, 56 Cal. L. Rev. 1612 (1968) 21

PAGE

Mishkin, The Supreme Court, 1964 Term-Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965) 21

Note, Interrogations in New Haven: The Impact of Miranda, 76 Yale L. J. 1519 (1967) 25, 29

Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §3501(b) 3, 27

Robinson, Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L. J. 425 25

Rosenberg, Competency for Trial—Who Knows Best, 6 Cr. L. Bull. 577 (1970) 27

Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, N. Y. U. L. Rev. 631 (1967) 18, 21, 23

Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966) 21, 23

Stephens, Police Interrogation and the Supreme Court: An Inquiry Into the Limits of Judicial Policy-Making, 17 J. Pub. L. 241 (1968) 25

1968 U. S. Code Congressional and Administrative News, pp. 2112-38 26

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972.

No.

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

PAUL D. WARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

The Commonwealth of Pennsylvania, through the District Attorney of Philadelphia, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Pennsylvania entered in the above-entitled case on December 20, 1971.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Philadelphia County in support of its order of December 11, 1969, removing a nolle prosequi is unreported and is printed as Appendix A attached hereto. The opinion of the Court of Common Pleas of June 19, 1970, vacating an earlier order of suppression and allowing a rehearing is unreported and is printed as Appendix B attached hereto. The opinion of the Court of Common Pleas of November 13, 1970, denying the motion to suppress is unreported and attached as Appendix C. The opinion of the Pennsylvania Supreme Court reversing this order is reported at —— Pa. —— (1971) and is set out in Appendix D.

JURISDICTION.

The opinion of the Pennsylvania Supreme Court issued on December 20, 1971. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. section 1257(3).

QUESTIONS PRESENTED.

1. Must *Miranda v. Arizona*, 384 U. S. 436 (1966), be applied to a case where the confessions occurred prior to *Miranda* but the trial will fortuitously occur post-*Miranda*?

2. Does not the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. Sec. 3501(b) dictate that respondent's clearly voluntary confessions be held properly admissible at trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "no person . . . shall be compelled in any criminal case to be a witness against himself."

The Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. Sec. 3501(b) provides as follows:

ADMISSIBILITY OF CONFESSIONS.

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was sus-

pected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

STATEMENT OF THE CASE.

A. Procedural History.

Appellant Paul Ware was arrested on September 27, 1963, in the midst of an apparent attempted burglary (N. T. 11-14). Because he matched a description in a wanted circular issued in connection with a homicide case, Ware was later questioned about this homicide and others and, on October 3, 1963, he confessed to being the perpetrator of four separate robbery-murders in which his modus operandi had been to gain entrance, while dressed in a formal black suit with bow tie, dark hat and sunglasses, to the homes of very elderly persons on some pretext, then rob his victims and kill them in such a way that the deaths almost appeared accidental (two were shoved down basement stairways; one was crushed under a heavy dresser) (N. T. 14-15, 94, 97-98, 117, 145-47, 154-57).

On December 12, 1963, after being indicted, Ware was declared incompetent to stand trial and was committed to Farview State Hospital. Slightly more than three and a half years later, on July 19, 1967, he was determined to be

competent, after a full staff hearing at which members of the Farview medical staff, the department of psychology, the social work department and others were present (N. T. 8, 9, 129).

On May 23, 1968, the case came before the Hon. Robert N. C. Nix, Jr. for a hearing on defendant's motion to suppress. The motion was granted on the ground that defendant had not received the full warnings set forth in *Miranda v. Arizona*, 384 U. S. 436 (1966). On December 12, 1968, the Philadelphia District Attorney petitioned the Hon. D. Donald Jamieson for the entry of a nolle prosequi on the homicide bills for the reason that without defendant's statements the Commonwealth could not prove its case. Defendant offered no objection and Judge Jamieson approved the nolle prosequi.

On August 11, 1969, the Commonwealth moved for removal of the nolle prosequi and on December 11, 1969, Judge Jamieson granted the request, rejecting a speedy trial claim raised by defendant at that time (see Appendix A). The Commonwealth then petitioned Judge Nix to vacate his suppression order and allow a rehearing. This motion was granted on June 19, 1970 (see Appendix B), and a suppression hearing was held on June 25 and 26, 1970. On November 13, 1970, Judge Nix held that the confessions were voluntarily made and not barred by *Miranda v. Arizona* (see Appendix C). The Pennsylvania Supreme Court allowed an interlocutory appeal after the hearing judge certified that an important question of law was involved, this certification being made on December 1, 1970, upon the joint petition of respondent and petitioner. On December 20, 1971, the Pennsylvania Supreme Court reversed the lower court on the ground that *Miranda* must be applied to respondent's 1963 confessions.

B. Factual History.

On September 27, 1963 at about 12:30 P.M. officer John Park was walking south on Ridge Avenue from 33rd Street

when he was told that a woman in the 3200 block was looking for a policeman (N. T. 11-12). He proceeded to the 3200 block of Dakota Street and met a woman who told him that a young Negro male wearing a white shirt and bow tie with a soft hat and sunglasses had just attempted to break into her home (N. T. 12). Then another woman a half block away shouted, "He's here again," and as defendant Paul Ware sought to flee the officer grabbed him, the woman all the while screaming "That's him" (N. T. 12-13). Ware spontaneously told the officer he was there for a cleaning job (N. T. 13).

Ware was taken into custody and transported to the 22nd District at about 1:00 P.M. Officer Park informed Lieutenant Brown that Ware closely fit the description on a wanted circular which described a person who wore a bow tie, black suit, white shirt, dark soft hat, and sunglasses (N. T. 14-16). As a result, Ware was transferred upstairs to th. North Central Detective Division. He was questioned at this time by Detective Roberts, a Negro, who greeted him as a Muslim and said, "You don't have to talk to me, but if Allah will it that you be here it must be for a purpose, so therefore we can talk" (N. T. 27-28, 200). Detective Roberts questioned Ware only about the incident for which he had been arrested; defendant made no admissions and repeated his story about being at the home for a cleaning job (N. T. 29-30).

At about 4:00 P.M. Ware was taken to the Homicide Unit at the Police Administration Building by Officer Park and Detective Roberts, arriving at 4:20 P.M. He was turned over to Sergeant Green, who was told that Ware was a suspect in the murder of Daniel Gandy, the subject of the wanted circular (N. T. 17, 32-33). Green talked to Ware for about an hour and a quarter, first talking mostly of background matters—where defendant lived, his relatives, what he did for a living. Then the officer began to talk about the Gandy homicide. Ware denied any knowledge of the matter (N. T. 34).

Sergeant Green then left the room, leaving Ware unhandcuffed but with the door locked. Green arranged for fingerprinting, which was done upstairs in the Police Administration Building at the Mobile Crime Detection Unit between 6:00 P.M. and 6:25 P.M. (N. T. 35-36). Ware was again left by himself while arrangements were made for a lineup (N. T. 36-37). He was then placed in a lineup with three other persons and viewed through a two-way mirror in the interview room by Mrs. Gandy. Mrs. Gandy was questioned for about an hour and a half but was unable to make an identification (N. T. 38). Defendant was not questioned at this time nor was he questioned further until about 10:30 P.M., when he was asked to take a polygraph test (N. T. 38, 40). He signed an agreement to take the test but was not given any *Miranda* warnings (N. T. 50-51). The results of the test were considered by the detectives to be negative, indicating that defendant did not kill Gandy (N. T. 42-43), although the polygraph did show some reaction when defendant was asked if he knew who threw Gandy down the cellar steps and whether he had intended to rob the occupants of the home where he was arrested (N. T. 54). The testing terminated at 11:56 P.M. and the examiner spoke with Ware briefly, simply to relax him after the test (N. T. 57). Ware was then left alone in the room until about 1:00 A.M. while the test results were explained to Sergeant Green (N. T. 57). Since Ware was no longer considered a suspect in the Gandy case, he left the Homicide Unit in Detective Roberts' custody (N. T. 42-44).

Ware was not questioned further and had no personal contact with the police until his preliminary hearing on the burglary charge the next morning, a Saturday, September 28, 1963 (N. T. 19). He was held without bail for court (N. T. 30). Detective Roberts then returned Ware to the robbery unit of the Police Administration Building and, together with officer William J. Connally, questioned him from about 11:00 A.M. to 12:00 noon regarding unsolved burglaries in the North Central area which were listed in a "robbery journal" (N. T. 63-65). Ware was cooperative

and very calm, not being handcuffed at this time (N. T. 67-68). He talked for about a half hour and then said that if the officers wanted to he would go with them to point out the places he had entered (N. T. 65-67, 79). So Detective Roberts and Detective Connally took defendant on a tour lasting until about 4:30 P.M. during which Ware pointed out twelve locations that he had burglarized (N. T. 69). He was also able to describe the homes and the people involved in some detail, details which were later corroborated (N. T. 188). Although he told the officers there were other places, they decided to wait until the next week due to the late hour (N. T. 73). Upon returning to the Police Administration Building, formal statements were taken on the twelve burglaries and completed by about 7:00 P.M. At 7:20 P.M., Ware was placed in an emergency wagon to be returned to Holmesburg prison (N. T. 189).

Ware remained at Holmesburg until October 1, 1963, when he had a preliminary hearing on five of the burglaries which he had admitted committing (N. T. 20-21). After the hearing he agreed to take the police on another tour of the locations he had burglarized (N. T. 71, 191-92). He first wrote a letter to his aunt (delivered to Detective Roberts) in which he stated, "I am going to level with the police and I'm going to tell them all I have done in the past three years. This is the only way out" (N. T. 196-98). On his second trip, Ware pointed out twenty-four places in the course of about four hours (N. T. 74, 192). He was again very calm and cooperative; no promises of any kind were made as to what would happen if he showed them the places (N. T. 75). Defendant was brought back to the Police Administration Building at about 9:00 P.M. and a written statement was taken on each of the twenty-four burglaries and on three more which Ware then recalled. Some time before midnight Ware was sent back to Holmesburg (N. T. 192-95).

The next day, October 2, 1963, a writ was obtained from Judge Guerin permitting Detective Albert Krimmel to bring Ware to the homicide division of the Police Administration Building for questioning regarding the homicide

of Dr. James Kalbach. Detective Krimmel, who was assigned to the Kalbach homicide, sought to question Ware because he had been admitting to robbing elderly people. Defendant was picked up at 1:00 P.M. and interviewed at about 1:40 P.M. by Detective Krimmel. Detective Krimmel told Ware he was being questioned in regard to the Kalbach homicide; he did not give defendant the warnings later set forth in *Miranda v. Arizona*, 384 U. S. 436 (1966) (N. T. 87-91).

Defendant was at first hostile toward Detective Krimmel because of his race, saying all white people were deceivers and oppressors of the black man. Ware declared that he was a practicing Muslim (N. T. 92). For most of the questioning period involved (1:40 P.M. to 4:00 P.M.) Ware talked of his philosophies of the relation between blacks and whites in America. The detective expressed sympathy with some of these views and Ware's hostility subsided (N. T. 92-93, 100).

Ware then began by telling how he selected his victims, that he was able to pick elderly white persons by examining their homes and noticing the lack of recent paint, the positioning of the drapes, the shades pulled, etc. He added that he took only money and never any objects which could be traced. The detective said that this was very clever (N. T. 94-96). Defendant then became very friendly. Asked about some plane and bus tickets to various cities which had been found at his residence, he explained that he had visited Muslim mosques in these cities (N. T. 96). Detective Krimmel then questioned Ware specifically about the Kalbach homicide. Ware at first denied it, but when reminded of the similarities between the burglaries he had already admitted to and that of Dr. Kalbach, Ware said that he did not mean to harm the man, only to rob him, that he had placed a large dresser over the doctor only to make good his escape (N. T. 97-98). This confession was corroborated by the fact that the victim had been wedged under a dresser when he was found. However, the dresser was not partially leaning against the wall, as stated in Ware's confession, but had

rather been slammed down on the 92-year-old deceased, causing his eventual death (N. T. 97-99; N. T. Preliminary Hearing of Oct. 3, 1963 at 7).

From 4:00 P.M. to 4:20 P.M. Ware wrote a short synopsis of his statement and then had a drink of water and went to the men's room. At 4:35 P.M. he ate (N. T. 102-109). This rest period continued until 5:02 P.M. (N. T. 108-111).

At this time Detective Krimmel and Captain Golden decided to question Ware regarding the homicide of Mr. Gandy. Ware again started by denying any knowledge of the case (N. T. 110, 112). He was again initially somewhat hostile and talked for some forty-five minutes to an hour about his Black Muslim philosophy (N. T. 113-116). When confronted with the similarity in the offenses (Mr. Gandy, aged 87, N. T. S. H. of 12/12/68 at 2, was shoved to his death down a steep cellar stairway), Ware confessed, accurately describing the Gandy residence in great detail (N. T. 117-118). After the oral statement, Ware made a short written statement (from 7:12 P.M. to 7:31 P.M.). From 7:32 P.M. to 7:45 P.M. he had a rest period in which he was given two cartons of milk and allowed to walk around in the large main homicide room (N. T. 141).

At 7:45 P.M. Detective Krimmel decided that Ware should be questioned concerning a third homicide, that of Mrs. Grauley, a very elderly white lady pushed to her death at the foot of her basement stairway on July 12, 1963 (N. T. 143). Detective Krimmel again did the questioning while Detective Roberts and Detective Kinsey sat in. Ware was this time a bit hostile toward even the Negro detectives who had "sold out" to the establishment (N. T. 144). But his hostility subsided. He explained that he attacked elderly white people not only because of his Muslim religion but also because they would be easy to overcome (N. T. 147). By about 9:00 P.M. he admitted the Grauley homicide and gave a detailed oral statement. After a handwritten statement which was finished at 9:50 P.M. he rested and was permitted to walk around the large room for exercise. He was given water and allowed to go to the toilet; he refused a meal (N. T. 145, 151-52).

Finally, at 10:11 P.M. Detective Krimmel started to question Ware about the death of a Mr. Leonard Clark, age 92 years old (N. T. Preliminary Hearing at 9). There was this time less hostility and shortly Ware confessed, giving vivid details of the inside of the home (N. T. 152-57). Between 11:00 P.M. and 11:15 P.M. Ware made a handwritten statement covering this fourth murder (N. T. 155-57). He was allowed to rest and offered food, but asked only for two more cartons of milk (N. T. 158).

At about 11:40 P.M. Ware was asked if he would be willing to give a formal typewritten statement on each of the four homicides and he said he would. A stenographer then took the statements. Ware was first told, before each statement, that anything he said could be used against him at trial. He said he understood and was willing to make a voluntary statement. He was not given the full set of warnings now known as *Miranda* warnings (N. T. 160-63). During the taking of the statements Ware initialed photographs of the scenes as being the locations where the homicides occurred (N. T. 167). Between 2:40 A.M. and 4:20 A.M. he made corrections in each statement, read them aloud into a tape recorder, and signed each one (N. T. 164-66). He was then photographed to show his condition (N. T. 168).

Ware was then taken to the scenes of each of the homicides and in each instance, a few blocks from the area, he was asked to direct the way to the homes of the victims and he did (N. T. 170-72). Ware was brought back to the 23rd police district at 5:30 A.M. and Assistant District Attorney Richard A. Sprague asked to talk to him about the charges and about his treatment by the police. Defendant told Mr. Sprague that he had been treated fine (N. T. 172-76, 207). Ware was then slated in the 23rd district at 5:35 A.M. and returned to Holmesburg (N. T. 175).

Ware was never struck or threatened in any way and he was never denied any requests he made (N. T. 175-76).

Ware's school records were introduced by the Commonwealth, indicating that he had attended Catholic high schools through the first half of his senior year and had

attended Lincoln Prep High School for one month (N. T. 216).

Dr. Bernard Willis, clinical director and assistant superintendent of Farview State Hospital (where Ware was committed in December of 1963), testified that he could not with certainty give an opinion as to defendant's mental condition at the time the statements were given. While he felt that Ware had been suffering from some mental disorder at that time, he thought it was not as serious then as when Ware was committed. In answer to questions by the Court, Dr. Willis said that in his opinion defendant at the time of his questioning realized that he was under suspicion for serious offenses, had an intellectual appreciation of the fact that admissions on his part could be used against him by the authorities and that, whatever Ware's illness may have been, it probably had no degree of compulsion with it that would make him act against his own interests (N. T. 130-37).

The hearing judge held that defendant's admissions were voluntarily made since defendant was never threatened, promised anything or otherwise subjected to any improper influences; he was well fed and exercised and never subjected to long periods of questioning, much of the time being taken up by defendant's lengthy monologues on his Black Muslim philosophy; he spent much of the time involved living the life of a normal detentioner at Holmesburg and was brought before a neutral magistrate; finally, "nothing was educed which might indicate that he did not understand the consequences of his statement or which would compel him to act against his will" (Appendix C at 59).

REASONS FOR GRANTING THE WRIT.

I.

THE PENNSYLVANIA SUPREME COURT HAS IMPROPERLY HELD THAT DECISIONS OF THIS COURT COMPEL IT TO APPLY MIRANDA v. ARIZONA, 384 U. S. 436 (1966), TO A CASE WHERE THE QUESTIONING OCCURRED BEFORE THE MIRANDA DECISION (ALTHOUGH THE TRIAL WAS FORTUITOUSLY DELAYED UNTIL AFTER MIRANDA) SINCE:

1. **The "Trial-Date" Language in Johnson v. New Jersey, 384 U. S. 719 (1966), was Inadvertent, Unrequired by the Facts of That Case and Not Involved in Briefing or Argument of That Case;**

2. **Even if This Language Had Been a Considered Choice Between a "Trial-Date" and an "Activity-Date" Cut-Off Rule for Retroactivity Purposes, it has Never Been Suggested by Any Court that a "Trial-Date" Rule of Prospectivity is Constitutionally Required;**

3. **In Later Cases Where This Court Eventually Did Make a Considered Choice Between a "Trial-Date" Rule and an "Activity-Date" Rule for Setting a Retroactivity Cut-Off Date, This Court has Consistently Adopted an "Activity-Date" Rule; and**

4. **An "Activity-Date" Rule is Eminently Preferable in View of (a) the Purposes of Miranda, Which Would in No Way be Furthered by Applying its Strictures to a 1963 Confession; (b) the Reliance by Police Officers (the Very Persons Who Must Enforce the Law on a Day-to-Day Basis) on Pre-Miranda Law; and (c) the Demoralizing Effect of Setting Free a Confessed Four-Time Murderer Needlessly and Continuing the Release of Countless Other Confessed Criminals Due to the Anomalous "Trial-Date" Rule.**

Paul Ware is ready to go to trial for four murders. However, essential to the case against him are his confessions made in 1963, which were held by the Pennsylvania Supreme Court to be inadmissible because of the supposedly "controlling and unambiguous" decision of this Court in *Johnson v. New Jersey*, 384 U. S. 719 (1966). The Court rejected any attempt to limit *Johnson* to its facts or to consider later cases by this Court which the Commonwealth claimed had in effect supplanted the "trial-date" rule with an "activity-date" rule: "We need not, however, respond to the Commonwealth's views as to what 'should be': to put it quite simply, the matter is no longer an open question" (Appendix D at 3).

The general question of whether *Miranda v. Arizona*, 384 U. S. 436 (1966), should be applied retroactively has already been decided in the negative by this Court in *Johnson*, decided only a week after *Miranda*. Unfortunately, however, this Court in *Johnson*, in an undoubtedly inadvertent statement, preceding a lengthy discussion of why *Miranda* should be applied prospectively, set the relevant cut-off date as follows:

> We hold . . . that *Miranda* applies only to cases in which the trial began after the date of our decision of one week ago.

384 U. S. at 721. Since, in *Johnson*, both the questioning and the trial occurred "long before" *Miranda (Id.)*, there was no need to discuss the question raised in the instant case. Indeed, there was no discussion of the question.[1] All

---

[1] As stated by the suppression hearing judge, "It would be most unjust and intellectually dishonest to ascribe to the **Johnson** Court a blanket approval of retroactivity to those cases yet to be tried when the entire decision was devoted to a scholarly and meticulous explanation of why **Miranda** should be denied retroactive application. It is our view that **Johnson's** holding simply stated that **Miranda** doesn't apply to trials beginning prior to June 1966. We must reject the contention that it supports the proposition that requires its application in all trials subsequent to that date" (Appendix C at 65).

This Court itself has acknowledged, in a somewhat different context, that statements in its opinions unnecessary to the actual disposi-

that the Court said in *Johnson* concerning the question of the appropriate cut-off date for applying *Miranda* was that there were "no jurisprudential or constitutional obstacles" (384 U. S. at 733) to a different cut-off point than that initially selected in *Linkletter v. Walker,* 381 U. S. 618 (1965), where the Court looked at the date on which a defendant's conviction became "final."

Thus, the Commonwealth contends that the basic question involved in this case has not yet been considered by this Court.[2]

---

tion of the case cannot be regarded as controlling. Thus, in **Harris v. New York,** —— U. S. ——, 91 S. Ct. 643, 645 (1971), the Court stated that, "discussion of that issue was not at all necessary to the Court's holding and **cannot be regarded as controlling.**" (Emphasis added.) Also cf. **Jenkins v. Delaware,** 395 U. S. 213, 216 (1969): "That there is language in **Johnson** supporting the positions of both petitioner and respondent demonstrates what some courts and commentators have readily recognized: in that decision, we did not consider the applicability of **Miranda** to retrials. The issue simply was not presented." See also **Frazier v. Cupp,** 394 U. S. 731 (1969), limiting the decision in **Escobedo v. Illinois,** 378 U. S. 478 (1964), to its facts.

---

[2] The Commonwealth fully concedes that the fact that the language in **Johnson** appears to have been dicta, in fact, not even **considered** dicta, has not prevent the vast majority of lower courts from feeling bound by it; although they have done so either with no discussion whatever or very grudgingly, often acknowledging the adopted rule's great cost to a rational application of the law.

See, in Pennsylvania, **Commonwealth v. Sites,** 427 Pa. 486 (1967) (confession of December 26, 1965; suppression hearing held April 26, 1966; trial was delayed until September 19, 1966); **Commonwealth v. Robinson,** 428 Pa. 458 (1968) (conviction reversed because of the use of a pre-**Miranda** confession for impeachment of defendant in a post-**Miranda** trial; the Court [Eagan, J.] noted that, "Ironically, the crime involved occurred on September 3, 1965, and if Robinson's trial had commenced prior to June 13, 1966, the date of the **Miranda** decision, the evidentiary use of the confession would not be constitutionally proscribed since all of the warnings of constitutional rights required by **Escobedo v. Illinois,** 378 U. S. 478, 84 S. Ct. 1758 (1964), were given." **Id.** at 460 n. 1); **Commonwealth v. Leaming,** 432 Pa. 326 (1968) (pre-**Miranda** confession of February 12, 1965; trial on September 27, 1966); **Commonwealth v. Bordner,** 432 Pa. 405 (1968) (November 23, 1965 confession; post-**Miranda** trial); **Commonwealth v. Dixon, Kontos,** 432 Pa. 423 (1968) (confessions of March 14 and 15, 1966); **Commonwealth**

v. Williams, 432 Pa. 557 (1968) (tacit admission of May 6, 1966; trial August 9, 1966); **Commonwealth v. Yount,** 435 Pa. 276 (1969) (April 29, 1966 statement. At 279 [Roberts, J.]: "The case before us illustrates the difficulty for the Commonwealth which **Johnson** can cause. Although appellant appears to have received almost all the warnings required by **Miranda,** he was not told that he was entitled to free counsel if he could not afford his own attorney. * * * Thus the Commonwealth failed to give all the warnings necessitated by **Miranda,** and this it was required to do even though **Miranda** had not yet been decided." Also see the concurring opinion of Justices Jones and Pomeroy, **id.** at 281-82); **Commonwealth v. Ware,** 438 Pa. 517 (1970) (February 1, 1966 statement); **Commonwealth v. Bennett,** 439 Pa. 34 (1970) (May 31, 1966 statement); **Commonwealth v. Singleton,** 439 Pa. 185 (1970) (April 29, 1966 statement; trial February 20, 1967); **Commonwealth v. Davis,** 440 Pa. 123 (1970) (April 4, 1966 statement) and **Commonwealth v. Ware,** —— Pa. —— (1971) (October 3, 1963 confession). Also cf. **Commonwealth v. Schmidt,** 423 Pa. 432, 445 (1966) (Roberts, J., dissenting on a different point) ("Since the essential rationale of **[Miranda]** seems to be deterrence of improper police practices I can see no sensible reason for making the trial date the determinative one. See **Linkletter v. Walker,** at 637, 85 S. Ct. at 1742. In my view the crucial date ought to be the date the confession was elicited and I would judge its admissibility according to the standards judicially announced at that time") and **Commonwealth v. Willman,** 434 Pa. 489 (1969) (Roberts, J. at 491-92: "It is not altogether clear * * * why **Johnson** utilized a date-of-trial test; rather than the date-of-occurrence test used subsequently in **Stovall v. Denno,** 388 U. S. 293, 87 S. Ct. 1967 (1967). It does seem, however, that the Court has wisely chosen in **Jenkins** to restrict to as great an extent as possible, within the limits of **Johnson,** the anomalous situation where the police are required to have given **Miranda** warnings before **Miranda** had been decided." O'Brien, J., concurring at 495-96: ". . . I would not have chosen the date-of-trial test utilized in **Johnson v. New Jersey,** 384 U. S. 719, 86 S. Ct. 1772 (1966), but would have selected the date-of-occurrence test of **Stovall v. Denno,** 388 U. S. 293, 87 S. Ct. 1967 (1967). * * * If the Court made a mistake in **Johnson,** as I believe it did, it should have said so, rather than seizing upon a distinction without a difference.").

See also **United States v. Vanterpool,** 394 F. 2d 697, 699-700 (2d Cir. 1968) (Judge Waterman, concurring) (". . . I do not agree with my brothers that the interrogation of March 1 complied with the above-quoted guideline laid down three and one half months later. I would wish that it had, for the United States Attorney does not seem to have been overreaching here and if he had known what the **Miranda** holdings were to be, I am sure he would have complied with them. Therefore, one is indeed sorely tempted, even though the accused's trial began after **Miranda,** and was therefore governed by the **Miranda** postulates, to hold that the interrogation, having been conducted pre-**Miranda,** ought to be construed to have complied with **Miranda** guidelines."); **United States v. Fox,** 403 F. 2d 97, 100 (2d Cir. 1968) (pre-

Miranda confession; post-**Miranda** trial; **Miranda** applied); **United States v. Chaplin,** 435 F. 2d 320, 322 (2d Cir. 1970) (held **Miranda** applicable to a pre-**Miranda** confession, but held that since the questioning officers "were not forewarned of this simple expedient" [telling an accused of his right to court-appointed counsel] "where **Miranda** is applied to pre-**Miranda** statements, this court will make an **ex post facto** inquiry into financial ability to determine whether a defendant, who has not been fully warned of an indigent's right to assigned counsel, has suffered prejudice."); **Smith v. Peyton,** 295 F. Supp. 1379, 1382 (W. D. Va. 1968) (dicta following **Johnson** dicta; held, surprisingly, no "custody"); **Sheer v. United States,** 414 F. 2d 122 (5th Cir. 1969) (dicta following **Johnson** dicta; held, without quoting the warnings given, that the testimony supported the conclusion that defendant had received "substantially" the same warnings as later required in **Miranda**); **Posey v. United States,** 416 F. 2d 545, 549 (5th Cir. 1969) (dicta following **Johnson** dicta; held, absolutely unbelievably, that there was no "custodial interrogation"); **Baines v. United States,** 426 F. 2d 833, 838 n. 6 (5th Cir. 1970) (dicta following **Johnson** dicta; held no custodial interrogation); **Rolland v. People of State of Michigan,** 320 F. Supp. 1195 (E. D. Mich. 1970) (first degree murder conviction reversed because of use of pre-**Miranda** confession for impeachment purposes in post-**Miranda** trial); **Griffith v. Jones,** 283 F. Supp. 794 (N. D. Ga. 1967) (struck down 1963 confession where defendant was given all the **Miranda** warnings except as to his right to assigned counsel); **Evans v. United States,** 375 F. 2d 355 (8th Cir. 1967) (applied **Miranda** to 1964 confession); **Groshart v. United States,** 392 F. 2d 172, 175 (9th Cir. 1968) (defendant warned on April 10, 1966 of right to silence and to an attorney, but not told of right to free counsel; **Miranda** applied); **Camacho v. United States,** 407 F. 2d 39 (9th Cir. 1969) (dicta following **Johnson** dicta; held, shockingly, no "taint" and no inadequacy in warnings in any event; the court even took the trouble to note that trial was originally scheduled for a date preceding **Miranda**); **People v. Welborn,** 82 Cal. Rptr. 845 (Cal. App. 1969) (dicta following **Johnson** dicta; held, surprisingly, that since the questioning was pre-**Miranda** and thus there was no "direct violation of established legal principles" and no intentional violation of the Fifth Amendment, evidence secured "as a direct result of appellant's admissions" was admissible); **Mora v. People,** 481 P. 2d 729 (Colo. 1971) (dicta following **Johnson** dicta; held that in cases where the questioning was pre-**Miranda,** the failure to fully comply with **Miranda** by not telling an accused of his right to a free attorney during questioning would not be fatal, a more relaxed standard being applied in such cases); **Young v. State,** 234 So. 2d 341 (Fla. 1970) (reversed defendant's conviction for first degree murder because of the use of his pre-**Miranda** confession to impeach him at his post-**Miranda** trial); **State v. Wong,** 430 P. 2d 330 (Hawaii 1967) (pre- **Escobedo** confession, post-**Escobedo** trial); **State v. Anderson,** 229 So. 2d 329 (La. 1969) (**Miranda** applied even though suppression hearing held pre-**Miranda**); **Commonwealth v. Bujnowski,** 267 N. E. 2d 924 (Mass. App. 1971) (pre-**Miranda**

confession held inadmissible because of failure to warn of right to court-appointed counsel); **People v. Tucker,** 172 N. W. 2d 712 (Mich. App. 1969) (held that the "fruit of the poisonous tree" doctrine is totally inapplicable to evidence obtained as a result of a pre-**Miranda** confession where the only "illegality" was the failure to give full **Miranda** warnings); **Guyette v. State,** 428 P. 2d 244, 247 (Nev. 1968) ("The interrogators complied with the law in existence when the interrogations occurred. The rub, of course, arises from the fortuitous circumstance that this case went to trial after **Miranda** was decided, and we must, as directed by **Johnson v. State of New Jersey,** 384 U. S. 719 . . . (1966), apply the **Miranda** doctrine to our consideration of the matter." Unbelievably enough, however, the court found the **Miranda** violation harmless error. See **id.** at 248-49.); **State v. Travis,** 231 A. 2d 205 (N. J. 1967) (pre-**Miranda** confession case where the court upheld the trial court's finding that the prosecution witnesses' testimony that they had given **Miranda** warnings was "vague, inconsistent, and lacked candor."); **People v. Kilduff,** 276 N. Y. S. 2d 814, 816 (N. Y. Co. Ct. 1966) ("Many cases in this County, the instant ones among them—Thousands, I presume, when the Nation is considered, had had their investigations completed and statements taken in accordance with the law as it existed before **Miranda.** Now, we are told that in all of these cases, which were awaiting trial on June 13, 1966, the statements must be excluded since the trials had not yet been held."); **People v. P,** 233 N. E. 2d 255 (N. Y. App. 1967) (dicta following **Johnson** dicta; held, amazingly, no "custody"); **People v. Peacock,** 287 N. Y. S. 2d 166 (N. Y. App. 1968) (remanded the case to determine whether evidence used in a post-**Miranda** trial was tainted by defendant's pre-**Miranda** confession); **State v. Butler,** 249 N. E. 2d 818 (Ohio 1969) (**Miranda** said to be applicable where confession on November 29, 1965 and trial delayed beyond date of **Miranda.** Held, however, that confession was admissible because used only to impeach defendant); **State v. Knott,** 249 A. 2d 421 (R. I. 1969) (applied **Escobedo** "with no small reluctance" to a pre-**Escobedo** confession where the confession was in January of 1963 but the trial was delayed a year and a half while defendant's competency was determined); **Penn v. Commonwealth,** 169 S. E. 2d 247 (Va. 1969) (dicta following **Johnson** dicta; held, unbelievably, that the statement had been "volunteered"); and **Flowers v. State,** 168 N. W. 2d 843 (Wis. 1969) (dicta following **Johnson** dicta; held confession was "volunteered").

A few jurisdictions have had the courage of their convictions, and have, without reversal, held that **Miranda** should be applied prospectively from the date of questioning. See **Clark v. Smith,** 164 S. E. 2d 790, 795 (Ga. 1968) (trial on June 14, 1966); **State v. Lewis,** 164 S. E. 2d 177, 186 (N. C. 1968) ("The date the trial or retrial is commenced is unrelated to whether the law enforcement officers obtained the evidence according to constitutional standards upon which they reasonably placed reliance. As stated by Justice Schaefer, of the Supreme Court of Illinois, in The Control of 'Sunburst': Techniques of Prospective Overruling, op. cit. at 411: 'The earlier constitutional stan-

dards were relied upon, not at the moment that the trial commenced, but at the moment that the interrogation took place.' In our view, **Miranda** should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made. We perceive a trend towards this conclusion in decisions of the Supreme Court of the United States discussed herein."); and **State v. Gannites,** 221 A. 2d 620 (R. I. 1966) ("While we apply the **Johnson** principle of prospective application to **Mendes [State v. Mendes,** 210 A. 2d 50 (R. I. 1964), extended **Escobedo** beyond its precise factual situation and held that the failure of the police to advise a defendant of his right to remain silent and to the assistance of counsel during his custodial interrogation made his incriminating statement inadmissible] we hinge it to the time of the interrogation rather than to the date of the commencement of the trial.").

The Commonwealth further contends that an "activity-date" rule of retroactivity is eminently preferable to a "trial-date" rule in the *Miranda* context and in no way prohibited by anything anywhere in the United States Constitution. Subsequent cases in the Supreme Court since *Johnson* have made it abundantly clear that an "activity-date" rule is not constitutionally prohibited, but is rather positively preferred. See, e.g., *Williams v. United States,* —— U. S. ——, 91 S. Ct. 1148 (April 15, 1971) (holding *Chimel v. California,* 395 U. S. 752 (1969) applicable only to *searches* conducted after the date of *Chimel*); *Jenkins v. Delaware,* 395 U. S. 213, 218 n. 7 (1969), which held *Miranda* inapplicable to re-trials tried after *Miranda*: "Our initial approach to prospective decision-making has undergone some modification. Compare *Linkletter v. Walker,* 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), with *Desist v. United States,* 394 U. S. 244, 89 S. Ct. 1030 (1969). With *Johnson* we began placing increasing emphasis upon the point at which law enforcement officials relied upon practices not yet proscribed; and, more recently, we have selected the point of initial reliance. See, e.g., *Desist v. United States, supra; Stovall v. Denno, supra.* In addition to being more consistent with the fundamental justification for not applying newly enunciated constitutional principles retroactively, this latest approach has obviated at least

one administrative problem, the treatment of retrials."; *Desist v. United States,* 394 U. S. 244, 253 (1969), which held *Katz v. United States,* 389 U. S. 347 (1967), applicable only to *wiretaps* occurring after *Katz*: "Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date."; and *Stovall v. Denno,* 388 U. S. 293, 300-301 (1967), which held *United States v. Wade,* 388 U. S. 218 (1967) and *Gilbert v. California,* 388 U. S. 263 (1967), applicable only to cases where the *confrontations* occurred after the decisions in these cases. Also cf. *United States v. Dickerson,* 413 F. 2d 1111, 1117 (7th Cir. 1969), which held, in recognition of the above trend, that a new rule applying *Miranda* to questioning of a taxpayer would be applied prospectively only to *interrogations* taking place after the date of the decision, and *State v. Brown,* 279 A. 2d 554 (Conn. 1971), where the court, recognizing the same line of authority, held that *Griffin v. California,* 380 U. S. 609 (1965), would not be applied to a defendant's 1961 trial despite the United States Supreme Court decision holding that it must be so applied since defendant's conviction was not yet "final" on the date of *Griffin. Cf. O'Connor v. Ohio,* 385 U. S. 92 (1966). The court stated that although the *O'Connor* case had never been expressly overruled, its foundation had been inexorably wiped out by the later cases and the Supreme Court would no longer follow it. The court quoted the following language from *Rowe v. Peyton,* 383 F. 2d 709, 714 (4th Cir. 1967), aff'd, 391 U. S. 54 (1968): "This court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead

from the Supreme Court to a conclusion inconsistent with an older Supreme Court case."[3]

Thus, the only question remaining is whether an "activity-date" rule of prospectivity is not preferable from every standpoint to a "trial-date" rule in the *Miranda* context. Every leading commentator has so concluded,[4] and, indeed, on many occasions the members of even the Pennsylvania Supreme Court have uniformly expressed precisely this view. See Note 2 *supra*. Thus, if, as the Commonwealth suggests, a reappraisal is required in this area of the law, it need not be an "agonizing" reappraisal; the question should, in fact, be quite easy. For absolutely every consideration points to the adoption of an "activity-date" rule in this case.

---

[3] Nothing in **DeStefano v. Woods**, 392 U. S. 631 (1968) or **Mackey v. United States**, —— U. S. ——, 91 S. Ct. 1160 (1971), suggests that the Court has occasionally preferred a "trial-date" rule over an "occurrence-date" rule, for in both cases the relevant "occurrence" was the trial itself such that the two dates coincided. **DeStefano** held nonretroactive the right to jury **trial** in serious criminal contempt cases set forth in **Duncan v. Louisiana**, 391 U. S. 145 (1968) and **Bloom v. Illinois**, 391 U. S. 194 (1968); **Mackey** held nonretroactive the Court's decisions in **Marchetti v. United States**, 390 U. S. 39 (1968) and **Grosso v. United States**, 390 U. S. 62 (1968), which held that, although the federal gambling tax provisions involved were not unconstitutional on their face, an accused would have a valid defense at **trial** to the introduction of any such tax returns. Cf. 390 U. S. at 61.

[4] See Schaefer, **The Control of "Sunbursts": Techniques of Prospective Overruling**, 42 N. Y. U. L. Rev. 631, 646 (1967) ("A police officer conducting an interrogation prior to **Miranda** could have complied fully with the then applicable constitutional standards but still have failed to comply with the newly added requirements. The earlier constitutional standards were relied upon, not at the moment that the trial commenced, but at the moment that the interrgation took place."); Fairchild, **Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"** 51 Marq. L. Rev. 254, 266 (1968); Johnson, **The Supreme Court of California, 1967-1968: Foreword: Retroactivity in Retrospect**, 56 Cal. L. Rev. 1612, 1621 (1968); Mishkin, **The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law**, 79 Harv. L. Rev. 56, 96-97 (1965); and Schwartz, **Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin**, 33 U. Chi. L. Rev. 719, 763-64 (1966).

Looking, first, at the three basic desiderata used by the United States Supreme Court in determining the fundamental retroactivity issue: the Court has repeatedly stated that,

> The criteria guiding resolution of the question implicate: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. Foremost among these factors is the purpose to be served by the new constitutional rule.

Desist v. United States, 394 U. S. 244, 249 (1969).

The Court in Johnson, in considering the first of the above elements, had no difficulty in concluding that the purposes of the new rules in *Escobedo* and *Miranda* would not be meaningfully served by applying them to the past. The Court emphasized in this respect that the new rulings did not pertain directly to the reliability of confessions in the way that their prior rulings on coerced confessions did. Rather, the decisions were directed at future police conduct. Thus, the purposes of *Escobedo* and *Miranda* would not be advanced by retroactive application since the "misconduct" of the police prior to *Escobedo* and *Miranda* had already occurred and would not be corrected by setting free the prisoners involved, since the only police conduct which can be deterred is future conduct. The Court next dealt with the factor of reliance:

> Prior to *Escobedo* and *Miranda*, however, we had expressly declined to condemn an entire process of incustody interrogation solely because of such conduct by the police. *Law enforcement agencies fairly relied on these prior cases*, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. (Citations omitted; emphasis added.)

384 U. S. at 731. Finally, the Court stated that retroactive application of *Miranda* and *Escobedo* would very seriously

disrupt the administration of criminal justice. Cf. 384 U. S. at 520-21.

In light of the above three criteria, then, what can be said as to the relative merits of a "trial-date" rule as opposed to an "occurrence-date" rule? It becomes obvious that a "trial-date" rule bears virtually no relation (or only a most haphazard relation) to the three criteria used by the Court in determining the retroactivity question. The time of trial will often, as in the instant case, vary fortuitously. As stated by Justice Schaefer, "Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system." Schaefer, *The Control of "Sunburst": Techniques of Prospective Overruling*, 42 N. Y. U. L. Rev. 631, 645 (1967). Under a "trial-date" rule, the availability of *Miranda* "will ultimately depend on such frustratingly inconsequential matters as the congestion of trial dockets and attorney's schedules; in some cases codefendants whose trials were severed will receive radically different treatment." Schwartz, *Retroactivity, Reliability and Due Process*, 33 U. Chi. L. Rev. 719, 764 (1966). These serious inequities are totally unnecessary. An "occurrence-date" rule will not only fully satisfy the purpose of *Miranda*, it will also accord with the "reliance" concept, since the earlier case law was relied upon not when the trial commenced, but when the interrogation took place. See Schaefer, *supra*, at 646. Also cf. *Desist v. United States*, 394 U. S. 244, 253 (1969).

It might be contended that the only "reliance" that should be considered is that of the prosecution at the time of trial. But such a position would have several insurmountable difficulties: it would neglect the justifiable reliance of police officers; it would bear no relation whatever to the purpose of *Miranda*, which was designed to control the future conduct of the police; and finally, it would run directly contrary to the holding of this Court in *Jenkins v. Delaware*, 395 U. S. 213 (1969), which held that *Miranda* did not apply to retrials occurring after the date of *Miranda*.

For if this Court had been concerned only with the reliance by the prosecution at the time of trial, then it would have applied *Miranda* to retrials. But it did not.[5]

---

[5] As stated in the suppression hearing judge's opinion, respondent's suggestion in the courts below that this Court in **Jenkins** had weighed all the "incongruities" referred to above is totally erroneous. A careful analysis of the **Jenkins** opinion reveals that the Court was there concerned only with the one-time incongruity resulting from the disparity in treatment between the first appellant who successfully brings about a change in the law and other defendants whose arrests or appeals (or trials) may have occurred at the same time. This Court was **not** there concerned with the kind of on-going incongruities referred to here.

Respondent also successfully relied on the following obiter dicta from **Jenkins**, 395 U. S. at 219-20:

> We of course could have applied **Miranda** to all judgments not yet final, although they were obtained in good-faith reliance upon cohstitutional standards then applicable. See **Linkletter v. Walker**, 381 U. S. 618, 85 S. Ct. 1731 (1965). As we pointed out, however, that choice "would [have] impose[d] an unjustifiable burden on the administration of justice." 384 U. S. at 733, 86 S. Ct. at 1781. On the other hand, we could have adopted the approach we took in **Stovall** and **Desist** and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See Schaefer, **supra**, at 646. But in an effort to extend the protection of **Miranda** to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. **Implicit in this choice** was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by **Miranda**. (Emphasis added.)

As the suppression hearing judge stated in dealing with this language: "The recognition of a situation is obviously not synonymous with its acceptance. It is a non-sequitur to conclude that, because the Court anticipated that there would in **some instances** be cases where delay would create an injustice, this necessarily requires the conclusion that the Court accepted this result. In the context in which this particular statement was made the Court was attempting to emphasize the lack of disruption to the administration of justice rather than consider those situations where delay had created a problem. Attempting by torturing the language of **Johnson** and **Jenkins** to find a specific answer to our present concern is quite similar to the vain efforts of many courts prior to the **Jenkins** decision to find the answer concerning retrials from the language of **Johnson**. * * * In **Jenkins**, the Court

Lastly, although the foregoing discussion is more than sufficient to show that *Miranda* should not apply where the questioning occurred pre-*Miranda*, one final consideration must be mentioned. And that is the matter of respect for law. Although not precisely quantifiable, this is a problem of increasing concern today and the decision in this case bears very heavily on this issue. The Commonwealth submits that the application of a rule such as *Miranda*, which does not deal with the integrity of the truth determining process,[6] to a case where the officers who are expected to have acted upon it had no way of knowing (in 1963) of its existence tends to create disrespect for that law—disrespect by the police (the very persons who are expected to uphold the law on a day to day basis),[7] by

---

attempted to explain its departure from its basic premise that the new rule should be for the benefit of 'future defendants' stating that the scope of retroactivity was limited to instances where there would be no betrayal of reliance or frustration of the administration of justice. A retroactive application in the instant factual situation would produce the opposite result. We feel compelled from the logic of **Johnson** and **Jenkins** to conclude that the philosophy of these decisions is incompatible with the result urged here by the defense" (Appendix C at 67-68).

[6] Cf. **Johnson, supra,** at 730 and **Harris v. New York,** —— U. S. ——, 91 S. Ct. 643, 645 (1971): "It does not follow from **Miranda** that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the **trustworthiness** of the evidence satisfies legal standards." (Emphasis added.)

[7] Studies on the impact of **Miranda** indicate that detectives and police already have "a sort of 'What's the use' feeling" as a result of the decision. Robinson, **Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply,** 1968 Duke L. J. 425, 521. See also Note, **Interrogations in New Haven: The Impact of Miranda,** 76 Yale L. J. 1519, 1610 (1967): "Some of the detectives responded to **Miranda** by taking a more negative attitude toward their work. They combined their resignation toward the decision with an attitude that if the Court was going to make their job more difficult, they would let the judges figure things out for themselves." Also cf. Stephens, **Police Interrogation and the Supreme Court: An Inquiry Into the Limits of Judicial Policy-Making,** 17 J. Pub. L. 241 (1968).

lawyers, by everyone, even lawmakers.[8] In fact, sound policies of constitutional decision-making rooted in the very essence of the concept of "rule of law" dictate that an "activity-date" rule be adopted by this Court. Cf. L. Fuller, *The Morality of Law* (1969), p. 39.

In summary, the Commonwealth respectfully urges that this Court act to wipe out an unjust "rule" that has existed for too long in this nation. There is abundant reason to do so and virtually none for not doing so.

Further, this Court should not countenance any argument to the effect that if we abide by the past unjust rule, we will not be releasing very many confessed murderers, for just as this Court and others have been vitally concerned about the rights of even one individual in the face of protests by the state that a huge financial burden would be imposed by the recognition of those rights, so too the fact that only a few murderers or rapists may go free should not be sneered at, especially when it would all be

---

A conceivable police reaction to an adverse decision in this case might well be that, "If we're wrong even when we're right, then to heck with trying to act according to the rules; we might as well do what we feel like and lie about it later at trial." Cf. **State v. Travis, supra,** note 2.

[8] Congress, in the Omnibus Crime Control and Safe Streets Act of 1968, has already demonstrated its dissatisfaction with the restraints that **Miranda** has imposed and has clearly indicated its intent to supplant the **Miranda** decision. See 18 U. S. C. §3501(b). Also cf. **United States v. White,** 417 F. 2d 89 (2d Cir. 1969). The primary impetus behind this legislation was the testimony of numerous judges, district attorneys, and legal scholars that the **Miranda** decision was an excessive broadside based on a misreading of the Fifth Amendment and was debilitating to proper police efforts to solve an increasingly severe crime problem in the country. See 1968 **U. S. Code Congressional and Administrative News,** pp. 2112-38. Another decision setting free a four-time murderer needlessly can only justifiably exacerbate the feeling that the American criminal law system is drowning in a "sea of legalisms." Graham, "Bar Speakers Critical of Warren Court," **The New York Times,** p. 1, col. 3, 4 (July 17, 1971).

Even jurists have been exasperated by the **Johnson** dicta and have reflected this frustration in their interpretations of the law. See some of the surprising rulings cited in footnote 2, **supra.**

to no purpose—in no way furthering the ends of *Miranda*. The people of Pennsylvania, and of this nation, have a vital interest in even one case which is entitled to full recognition. Moreover, there are indications that defendant's position is not all that unique. See Rosenberg, *Competency for Trial—Who Knows Best?*, 6 Cr. L. Bull. 577, 578 (1970): "It has been projected that in the nation as a whole 'at any given time about 15,000 persons are hospitalized awaiting return for trial or discharge.'" See also the numerous cases from 1966 to 1971 where the precise issue in this case has arisen, including 12 from Pennsylvania alone (footnote 2 *supra*).

We cannot now, and never should have, abided the release of multiple murderers without trial and without any rational reason of law.

II.

AS A RESULT OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U. S. C. SEC. 3501(b), RESPONDENT'S CLEARLY VOLUNTARY CONFESSIONS SHOULD PROPERLY BE ADMISSIBLE AT HIS TRIAL.

The Supreme Court of the United States in *Miranda v. Arizona*, 384 U. S. 436 (1966), ruled that no confession could be introduced into evidence at any trial unless very detailed warnings were given and waivers obtained in accordance with that decision.

The Omnibus Crime Control and Safe Streets Act, passed by the Congress, signed by the President, and effective on June 19, 1968, revised the standards for the admissibility of confessions in Federal Courts, so that a confession can be introduced into evidence if it is voluntarily given considering all the surrounding facts. P. L. 90-351, Title II, 82 Stat. 210, 18 U. S. C. §3501:

ADMISSIBILITY OF CONFESSION

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

This law in effect seeks to overrule a doctrinaire interpretation of *Miranda* that has prevailed to this date by

permitting introduction in evidence of clearly voluntary statements made by an accused during custodial interrogation without the detailed warnings and waivers. The new act is in total harmony with the Fifth Amendment of the United States Constitution, which provides in pertinent part that: "no person . . . shall be compelled in any criminal case to be a witness against himself." It is also in complete accord with the "due process" clause of the Fourteenth Amendment, which is applicable to the states.

Although the Pennsylvania Supreme Court in the instant case did not discuss the issue of the applicability of this legislation, it may be assumed that that court found it inapplicable for the reason (stated in a prior case) that it "relates only to a 'criminal prosecution brought by the United States or by the District of Columbia.'" *Commonwealth v. Bennett*, 439 Pa. 34, 39 (1970). But even though this legislation applies by its terms only to federal prosecutions, it nevertheless expresses the clear idea that *Miranda*, in terms of the particular strictures there set forth, is not constitutionally binding on either federal or state courts. Cf. *Bolling v. Sharpe*, 347 U. S. 497 (1954). The Court in *Miranda* itself stated:

> . . . [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

384 U. S. at 467.

The Commonwealth submits that the enactment of the above 1968 statute creates the opportunity for this Court to reconsider whether the hypertechnical requirements of *Miranda* are indeed constitutionally required by the "due process" clause of the Fourteenth Amendment. The basic issue involved is whether a rule of law that has not been effective in assuring voluntariness of confessions[9] and that

---

[9] Cf. note, **Interrogations in New Haven: The Impact of Miranda**, 76 Yale L. J. 1519, 1536, 1563 (1967).

has not been accepted as a satisfactory approach to the problems of confessions by Congress and the general public,[10] is somehow a necessity of "due process." The Commonwealth respectfully submits that it is not. As stated by this Court in a different context in *United States v. Augenblick*, 393 U. S. 348 (1969) (Mr. Justice Douglas writing for a unanimous Court):

> But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in Moore v. Dempsey, supra, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 U. S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed. 2d 663) or trial by ordeal (Brown v. Mississippi, 297 U. S. 278, 285, 56 S. Ct. 461, 464, 80 L. Ed. 682) than a disciplined contest.

Id. at 356.

No such breakdown of "due process" occurs when a clearly voluntary confession is admitted into evidence against an accused without the full panoply of *"Miranda"* warnings. To apply an exclusionary rule to such a case via the vague contours of the due process clause is to misconceive the appropriate function of that provision.

The *Miranda* ruling has not worked out well or, at least, as contemplated. It has not led to fewer cases dealing with the voluntariness of confessions; rather, it has led to a proliferation of cases dealing with innumerable hypertechnical questions of law, questions of law that have nothing to do with the true voluntariness of the confession. This situation is intolerable. To free a confessed four-time murderer for such a technical error (even assuming the police had been aware of the *Miranda* requirements in 1963) is simply preposterous.

Judge Friendly, in a recent article, well summarized the feeling of many jurists, lawyers, and lawmakers in regard

---

[10] See Appendix E.

to exclusionary rules such as *Miranda* (and *Mapp v. Ohio*, 367 U. S. 643 (1961)[11]) which have nothing to do with the reliability of the truth-determining process or otherwise concern fundamental due process rights.[12]

> Legal history has many instances where a remedy initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin as to demand reappraisal—agonizing or not.

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

In short, the Commonwealth respectfully urges this Honorable Court to re-examine its *Miranda* decision in light of the new Congressional directive in this area.

---

[11] Cf. **Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics**, 403 U. S. 388, 413-20 (1971) (Burger, C. J., dissenting) and **Coolidge v. New Hampshire**, 403 U. S. 443, 491-91, 493, 496-500, 510 (1971) (Harlan, J., concurring; Burger, C. J., dissenting in part and concurring in part; Blackman, J., **id.**; and Black, J., **id.**).

[12] Compare, e.g., **Rochin v. California**, 342 U. S. 165 (1952) and **Price v. Georgia**, 398 U. S. 323 (1970).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES T. RANNEY,
Assistant District Attorney,
MILTON M. STEIN,
Assistant District Attorney,
Chief, Appeals Division,
JAMES D. CRAWFORD,
Deputy District Attorney,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

APPENDIX "A."

IN THE QUARTER SESSIONS COURT OF THE COUNTY OF PHILADELPHIA.

COMMONWEALTH OF PENNSYLVANIA vs. PAUL D. WARE.	December Sessions, 1963. Nos. 328, 343, 345, 349.

OPINION.

JAMIESON, J.

Before us is the petition of the Commonwealth to remove the nolle prosequi heretofore entered on four bills of indictment, each charging the defendant with murder.

HISTORY.

On October 3, 1963, shortly following his arrest on September 27, 1963, defendant, by oral and written statements, implicated himself in four separate murders. On December 12, 1963, after being indicted, defendant was declared incompetent to stand trial and committed to Farview State Hospital. Slightly more than three and one-half years later, around July, 1967, defendant was declared competent. Court-appointed counsel subsequently moved to suppress defendant's statements of October 3, 1963, on the ground that they were obtained in violation of the *Miranda* rule. After hearing, the Honorable Robert N. C. Nix, Jr., on May 23, 1968, granted defendant's motion. Thereafter, on December 12, 1968, the district attorney moved to nolle

prosequi the homicide bills for the reason that without defendant's statements, the Commonwealth could not prove its case. Defendant offered no objection and we approved the nolle prosequi.

On August 11, 1969, approximately eight months later, the district attorney petitioned for removal of the nolle prosequi on the bills of indictment. The matter was argued before us on October 24, 1969. All briefs have now been filed and the issue is ripe for decision.

DISCUSSION.

The Commonwealth has no recently obtained evidence to justify bringing defendant to trial. It is the Commonwealth's contention, however, that the law is now such that defendant's confessions should not be suppressed.[1] Accordingly, the aim of the Commonwealth is to submit a petition for reargument of the suppression order to Judge Nix. First, however, the Commonwealth must overcome defendant's objection to removal of the nolle prosequi.

Defendant opposes the instant petition on two grounds:—first, that there has been no substantive change in the holding of *Miranda* since the nolle prosequi of the four bills was entered, and, second, that permitting further prosecution would violate defendant's constitutional right to a speedy trial.

Since Judge Nix has heard and determined the suppression question, we will not deal with the merits of the Commonwealth's argument that the suppression hearing should be reopened. The issue before us, therefore, is whether defendant's right to a speedy trial will be denied should we

---

[1] Without going into extended detail, the Commonwealth's argument that defendant's confession should not be suppressed springs from its interpretation of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (June 19, 1968), 82 Stat. 197, and cases such as **Frazier v. Cupp**, —— U. S. ——, 89 S. Ct. 1420 (1969); **Jenkins v. Delaware**, —— U. S. ——, 89 S. Ct. 1677 (1969); and **Commonwealth v. Willman**, 434 Pa. 489 (1969).

grant the Commonwealth the right to proceed before Judge Nix.

Defendant asserts that *Klopfer v. North Carolina*, 386 U.S. 213 (1967), controls the decision in this case. *Klopfer* held that an unjustified postponement of trial through the use of nolle prosequi of an indictment over defendant's objection is a violation of his right to a speedy trial. However, as will be seen, that holding only applies where the defendant has demanded trial.

The constitutional right to a speedy trial is a right personal to the accused and may be waived by him. 57 A. L. R. 2d 307; *Danziger v. U. S.*, 161 F. 2d 299 (9th Cir. 1947), cert. denied, 332 U. S. 769; *Commonwealth v. Smihal*, 182 Pa. Super. 232 (1956). A defendant must demand trial or oppose continuances to claim the protection of the Sixth Amendment right, otherwise the defendant will be deemed to have waived the right. *Commonwealth v. Meehan*, 198 Pa. Super. 558 (1962); *Commonwealth v. Smihal*, supra.

In this case, counsel for defendant specifically stated that he did not oppose the entry of the nolle prosequi (N. T. Dec. 12, 1968, p. 8). Thus, there is no question that the defendant has waived any complaint he may have about denial of his constitutional right to a speedy trial prior to December 12, 1968. In addition, defendant has not since that time demanded trial. The right to a speedy trial was not designed to permit an accused to stand idly by when trial is delayed in the hope that he may never be brought to trial. See, *United States v. Haller*, 333 F. 2d 827 (2d Cir. 1964), cert. denied, 379 U. S. 921 (1964).

Even if defendant's inaction since December 12, 1968, would not be deemed a waiver of his right to a speedy trial, we hold that his right has not been violated.

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Commonwealth v. Stukes*, 435 Pa. 535, at 545 (1969).

Several factors must be examined in combination to determine if defendant's right to a speedy trial has been denied. These include the length of time of the delay, the diligence of all parties and the reasonable possibility that the defendant has been or will be prejudiced thereby. Dockery v. United States, 393 F. 2d 352 (D. C. Cir. 1968).

There is no indication that the eight month delay since the entry of the nolle prosequi has interfered with defendant's ability to defend this case. There is nothing of record to indicate that the defendant has lost any witnesses or that any other impediments to a legal or factual defense have intervened.

Defendant argues that a trial now would interfere with his continued mental rehabilitation.[2] In this, defendant may be correct. However, it might equally be concluded that a resolution of guilt or innocence might do more to help rather than hinder defendant's progress. On this score, it is pertinent to note that defendant regained his competency to stand trial while the murder charges were still outstanding against him and before his statements were suppressed.

It is contended that the district attorney lacked diligence in inquiring only once, on March 22, 1965, about defendant's competency to stand trial while defendant was at Farview. If this is correct, it is a fact which defendant could have raised when the nolle prosequi on the four bills was originally entered, but he did not. On the other hand, if the district attorney made no inquiry at all, we fail to see what relevance this would have in determining the Commonwealth's diligence in bringing the case to trial. Defendant's competency for trial is a matter to be determined by the Court aided by the expert opinions of the psychiatrists having defendant in their care.

As we look at this case, the prime issue is whether the Commonwealth is correct in asserting that there has been a

---

[2] Defendant was transferred from the Maximum Security Facility at Farview State Hospital to the less restrictive security facility at Norristown State Hospital in July, 1969.

change in the law. We do not decide this but take only the preliminary step of determining that it is in the interest of justice that we vacate the nolle prosequi previously entered on the bills and give the parties the opportunity to argue the suppression question. We hold that defendant has not been denied his right to speedy trial.

If the Commonwealth fails in its efforts before Judge Nix, defendant can promptly move for dismissal of the charges. *Pa. R. Crim. p. 316.*

ORDER.

AND NOW, to wit, this 11th day of December, 1969, the Commonwealth's Motion to remove the nolle prosequi heretofore entered on bills of indictment 328, 343, 345, 349, as of December Sessions, 1963, is herewith granted.

BY THE COURT:
/s/ D. DONALD JAMIESON,
J.

I HEREBY CERTIFY the foregoing to be a true and correct copy of the original ..... as filed of record in this office.

.....
Pro Clerk,
Quarter Sessions Court.

APPENDIX "B."

COMMONWEALTH
vs.
PAUL WARE

DECEMBER TERM, 1963
NOS. 328, 343, 345, 349
CHARGE: MURDER

OPINION.

NIX, J. Filed: June 19, 1970.

The issue presented for decision is whether the Court has the power to vacate its Order of Suppression entered May 23, 1968, and not appealed from, in order to permit the Commonwealth to present evidence and argument in opposition to the application for suppression.

HISTORY.

On October 3, 1963, the defendant, during custodial interrogation, made statements implicating himself in four separate robbery-murders occurring August 8, 1962; November 29, 1962; April 22, 1963; and July 12, 1963. On December 12, 1963, after his indictment on the aforementioned and related charges, the defendant was declared incompetent to stand trial and it was directed that he be committed to Farview State Hospital. In October, 1967, defense counsel filed application for the suppression of all custodial statements both written and oral. On May 23, 1968, the matter came before this Court for a hearing on the Application to Suppress. At a side bar conference both counsel for the defense and the Commonwealth agreed that

the application should be granted in that the statements were elicited in violation of the standards set forth in *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). With the agreement of counsel this Court entered the Order of Suppression without the benefit of testimony. This Court was assured by counsel that in all probability, from the medical information available, the defendant's condition would not improve to the extent that would justify his release from confinement under the Mental Health Act of 1966.

On December 12, 1968, upon request of the Commonwealth, the Honorable D. Donald Jamieson entered a nolle prosequi of the four murder bills in question. On February 21, 1969, Judge Jamieson ordered that the Commonwealth proceed to trial on the remaining burglary and robbery charges, after being advised by court psychiatrists that the defendant was in partial remission and then competent to stand trial. On April 29, 1969, Judge Jamieson granted the Commonwealth's request to nolle prosequi the remaining bills and the defendant was committed to Farview State Hospital under a civil commitment.

It was not until August of 1969 that the Commonwealth first questioned the applicability of the *Miranda Rule* to the instant case and moved for the removal of the nolle prosequi. On December 11, 1969, Judge Jamieson granted the request. This Court is now being petitioned to vacate the Order of Suppression and to allow a rehearing on the Application to Suppress.

DISCUSSION.

The crucial issue is whether the Court has the power to grant the request to vacate its Order. In an effort to secure finality in legal proceedings the common law has long recognized the principle that the Court's power to modify, amend, or vacate an order, decree, or judgment, ceases with the expiration of the term in which the order, decree, or

judgment was entered. *Carlin v. Robinson*, 2 Watts 379-80; *Stephens v. Cowan*, 6 Watts 513; *Mathers v. Patterson*, 33 Pa. 485; *Commonwealth v. McCafferty*, 124 Pa. 200, 76 Atl. 743 (1889); *Commonwealth v. Mackley*, 380 Pa. 70, 110 A. 2d 172 (1954). By statute, Act of June 1, 1959 P. L. 342, No. 70, §1,[1] this rule was adopted and modified only slightly to extend the period for thirty days from the entry of the order, decree, or judgment where the term would have expired before that period. *Commonwealth v. Vivian*, 426 Pa. 192, 231 A. 2d 301 (1967); *Commonwealth ex rel. Taylor v. Myers*, 208 Pa. Super. 417, 222 A. 2d 472 (1966); *Commonwealth v. Testa*, 203 Pa. Super. 201, 197 A. 2d 496 (1964); *Commonwealth v. Zelnick*, 202 Pa. Super. 129, 195 A. 2d 171, cert. denied 377 U. S. 1006 (1963). In addition to attempting to gain finality in legal proceedings, the rule is also directed against those who would attempt to nullify the limits for appeal fixed by statute by reviving the original action after the appeal period has expired. *Philadelphia Transportation Co. v. DiFrancisco*, 362 Pa. 326, 66 A. 2d 254 (1949); *Commonwealth v. Irwin*, 345 Pa. 504, 29 A. 2d 68 (1942); *Appeal of Claredon V.F.W. Home Assoc.*, 167 Pa. Super. 44, 75 A. 2d 171 (1950). However, a pertinent exception to this rule is that it does not apply to interlocutory orders. *Markofski v. Yanks*, 297 Pa. 74, 146 Atl. 569 (1929); *Coy v. Porter*, 17 S. & R. 59; 34 C. J. 216.

We, therefore, must determine whether an Order of Suppression is for *this purpose* a final or interlocutory order. While it is true that this order was an appealable one, *Commonwealth v. Gaskins*, 430 Pa. 298, 244 A. 2d 662 (1968); *Commonwealth v. Fisher*, 422 Pa. 134, 222 A. 2d 115 (1966); *Commonwealth v. Bosurgi*, 411 Pa. 56, 190 A. 2d 304, cert. denied 375 U. S. 910 (1963); in our judgment it is not final within the contemplation of the rule restricting the amendment of orders and decrees after the term. The *Act of June 1, 1959*, supra, clearly did not change the prior law as to the orders, decrees, and judgments to be

[1] 12 P. S. 1032.

covered by the Section: "In any civil, criminal or equitable proceeding in which the court *has heretofore been vested with the power* . . . to alter, . . . only during the term. . . ."

Although the appealability of an order, without specific statutory authority, is usually indicative of the fact that it is final, there are instances in our law where interlocutory orders are appealable where for all practical purposes, they present a somewhat final aspect. *Commonwealth v. Novak,* 384 Pa. 237, 120 A. 2d 543 (1956), cert denied 77 S. Ct. 35, 352 U. S. 825. *Commonwealth v. Kilgallen,* 379 Pa. 315, 108 A. 2d 780 (1954). *Paige v. Smith,* 130 Pa. Super. 536, 198 Atl. 812 (1938). In the *Bosurgi* decision supra, the Supreme Court recognized that the Order of Suppression was, in fact, not final in the traditional sense, but permitted the Commonwealth the right of appeal because of their limited right of review after verdict. To deprive the Commonwealth of immediate review of the Order of Suppression would, in fact, deny appellate review of the Suppression Order in the event of an adverse verdict.

An order is final when it terminates the litigation between the parties to the suit. *Sinking Spring Water Co. v. Gring,* 257 Pa. 340, 101 Atl. 732 (1917); *Pennsylvania Steel Company's Appeal,* 161 Pa. 571, 29 Atl. 294 (1894). Further, in each instance where the rule was applied in criminal cases limiting the power of the Court beyond the expiration of the term it concerned a judgment of sentence. See *e.g., Commonwealth v. Vivian,* 426 Pa. 192, 231 A. 2d 301 (1967).[2] It is, therefore, the opinion of this Court that the rule is inapplicable in the instant case since the Order in question was interlocutory.

Having determined the Court has the power to modify or vacate its original order, the question now arises as to

---

[2] **Commonwealth v. Testa,** 203 Pa. Super. 201, 197 A. 2d 496 (1964); **Commonwealth v. Zelnick,** 202 Pa. Super. 129, 195 A. 2d 171, cert. denied, 377 U. S. 1006 (1963); **Commonwealth ex rel. Taylor v. Myers,** 208 Pa. Super. 417, 222 A. 2d 472 (1966).

whether or not the Court should exercise its discretion in favor of the Commonwealth's request. One basis suggested by the Commonwealth for their belated attempt to question the propriety of the initial order is that in their view the *Miranda* decision, supra, has been significantly modified by the *Omnibus Crime Control and Safe Streets Act*, P. L. 90-351, Title II, 82 stat. 210, 18 U. S. C. §3501. This contention has been rejected by our Supreme Court in *Commonwealth v. Bennett*, —— Pa. ——, 264 A. 2d 706 (1970). Justice Eagan, speaking for the majority, suggests that the *Omnibus Act* applies only to criminal prosecution in Federal Courts by the U. S. Government or District of Columbia, and, therefore, not applicable to state prosecution.[3] The second ground suggested by the Commonwealth we feel has more merit. They argue that the rule laid down in *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), has been demonstrated to be subject to exception. See *Jenkins v. Delaware*, 395 U. S. 213, 87 S. Ct. 1677 (1969).[4] It is the Commonwealth's contention that where the statements were elicited prior to the *Miranda* decision, supra, and trial was delayed by virtue of the incapacity of the defendant until after June 13, 1966, the defendant should not derive the benefit from this delay. We, at this point, are not called upon to pass on this theory, we merely recognize that it is a contention with substance justifying the exercise of discretion to permit the Commonwealth to elicit additional testimony to establish for the record the reason for the delay of the trial.

We are further persuaded to grant the Commonwealth's request because we find no prejudice to the defendant.

---

[3] If, in fact, the **Omnibus Crime Control and Safe Streets Act**, supra relaxes the standards for custodial interrogation announced in **Miranda**, supra, it has yet to be determined whether such relaxation is in violation of the U. S. Constitution.

[4] While the majority in **Jenkins**, supra, attempted to distinguish between "trial" and "re-trials" we are inclined to accept Justice Harlan's view that such a distinction is specious.

Since the original order was entered by agreement without testimony, this Court will permit a full Suppression Hearing. The defense will be permitted to introduce testimony questioning the voluntariness of the statements as well as the denial of the assistance of counsel. The defendant still has available to him the allegation of the denial of a speedy trial if the facts support such a contention. Were we to rule otherwise, the Commonwealth would be foreclosed from further prosecution of these most serious charges without the benefit of having the issues fully litigated.

We are not unmindful of the Commonwealth's original agreement to the entry of the order and their tardy request that it be vacated.[5] In an action between private individuals such a record would justify precluding a party from further litigation of the cause. Here, however, we cannot and will not penalize the citizens of this community, because of the dereliction of their District Attorney. The seriousness of these charges demands that the issues in this litigation be fully aired and that both sides be given a full opportunity to exhaust all of their remedies.

ORDER.

AND NOW, to wit, this 19th day of June, 1970, the Order of this Court entered May 23, 1968, is hereby vacated.

Further, it is ORDERED that a Suppression Hearing be held on the defendant's Application to Suppress on June 25, 1970 at 10:00 A.M. in Room 243, City Hall. Leave is granted to the defendant to amend their petition to add any additional grounds for suppression that they wish the Court to rule upon.

BY THE COURT:
NIX, J.

---

[5] The District Attorney at the time of the original application had the opportunity to raise the present objection.

APPENDIX "C."

IN THE COMMON PLEAS COURT OF PHILADELPHIA COUNTY, TRIAL DIVISION—CRIMINAL SECTION.

COMMONWEALTH vs. PAUL WARE.	}	December Term, 1963. Nos. 328, 343, 345, 349: Charge: Murder.

OPINION.

NIX, J. FILED: November 13, 1970.

HISTORY OF CASE.

On September 27, 1963, Paul Douglas Ware was arrested and questioned in connection with a burglary. He then was questioned about some other crimes and on October 3, 1963, during custodial interrogation made statements implicating himself in four separate robbery-murders which occurred in 1962 and 1963. On December 12, 1963, after his indictment on the aforementioned and related charges, the defendant was declared incompetent to stand trial and it was directed that he be committed to Farview State Hospital. In October, 1967, defense counsel filed application for the suppression of all custodial statements, both written and oral. On May 23, 1968, the matter came before this Court for a hearing on the Application to Suppress. At a sidebar conference both counsel for the defense and the Commonwealth agreed that the application should be granted in that the statements were elicited in violation of the standards set forth in *Miranda v. Arizona*, 384 U. S.

436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). With the agreement of counsel this court entered the Order of Suppression without the benefit of testimony. This Court was assured by counsel that in all probability, from the medical information available, the defendant's condition would not improve to the extent that would justify his release from confinement under the Mental Health Act of 1966.

On December 12, 1968, upon request of the Commonwealth, the Honorable D. Donald Jamieson entered a nolle prosequi of the four murder bills in question. On February 21, 1969, Judge Jamieson ordered that the Commonwealth proceed to trial on the remaining burglary and robbery charges, after being advised by the court psychiatrist that the defendant was in partial remission and then competent to stand trial. On April 29, 1969, Judge Jamieson granted the Commonwealth's request to nolle prosequi the remaining bills and the defendant was committed to Farview State Hospital under a civil commitment.

In August of 1969 the Commonwealth moved for the removal of the nolle prosequi and on December 11, 1969, Judge Jamieson granted the request. This court was then petitioned to vacate the Order of Suppression and allow a re-hearing on the Application to Suppress. On June 19, 1970, this court vacated the Order of Suppression and ordered that a Suppression Hearing be held on June 25, 1970, to permit testimony as to the reason for the delay of the trial, as to the voluntariness of the statements and as to the absence of warnings of his right to remain silent and to receive assistance of counsel.*1 On June 25 and 26, 1970, the hearing was held with the Commonwealth presenting ten witnesses and fourteen exhibits and the defense offering no testimony.

---

*1 See Opinion filed by this Court June 19, 1970.

QUESTIONS INVOLVED.

1. Whether the incriminatory statements made by the defendant during custodial interrogation were voluntary.

2. Whether the statements made by the defendant during custodial interrogation must be suppressed because of the failure to give the warnings mandated by the Supreme Court of the United States in *Miranda v. Arizona.*

FINDINGS OF FACT.

1. While walking his beat on September 27, 1963, at approximately 12:30 P.M., Officer Parks was informed that a woman was looking for a policeman. He proceeded to the 3200 block of Dakota Street where he met the woman who described to him a man who had attempted to enter her home (N. T. 12).

2. As Officer Parks proceeded down the street he heard another woman scream—"He's here again."—from the second story window of a home at 2301 North 32nd Street. As Officer Parks entered that home he came upon the defendant Paul Douglas Ware, who was leaving and he grabbed Ware as the woman screamed—"That him!" Ware told the policeman that he was there for a cleaning job and that he was a Roman Catholic (N. T. 12-13).

3. Officer Parks called for a wagon and took Ware to the 22nd District, arriving at approximately 1:00 P.M. (N. T. 14). After consulting with his superior, mentioning the resemblance of Ware to the description on a wanted circular for the Gandy murder, Parks took Ware to the North Central Detective Division, located in the same building, at 1:10 P.M. (N. T. 14-16).

4. Ware was questioned by Detective Roberts who told him: "You don't have to talk to me, but if Allah will it that you be here it must be for a purpose, so therefore, we can talk" (N. T. 200). Roberts questioned Ware from 1:00 P.M. to 4:00 P.M., limiting the scope of the interrogation to the incident for which Ware had been arrested. He made no admissions and reiterated his claim that he was at the home for a cleaning job (N. T. 16-18; 27-30).

5. At 4:00 P.M., September 27, 1963, Ware was taken by Officer Parks and Detective Roberts from North Central Detective Division to the Police Administration Building (hereafter referred to as P. A. B.), arriving at 4:20 P.M. (N. T. 18, 186).

6. Ware was turned over to Sergeant William Green of the Homicide Division Headquarters in the P. A. B. He was aware that Ware was a possible suspect in the Gandy homicide which was his assigned case. Green placed Ware in an interview room (N. T. 32-33).

7. The first and all subsequent interrogations of Ware in the P. A. B. occurred in interview rooms which are bare cubicles, approximately nine feet by nine feet, containing a table and two chairs with a two-way mirror window on one wall for observation from the hallway into the room (N. T. 33).

8. Without giving Ware any warnings, Green questioned him for about one hour to an hour and a quarter concerning the Gandy homicide. Ware denied any knowledge of the crime (N. T. 34-35).

9. Between 6:00 P.M. and 6:25 P.M., Sergeant Green took Ware to the Mobile Crime Detection Unit also in the P. A. B. where Ware was fingerprinted (N. T. 35-36).

10. Between 6:25 P.M. and 7:00 P.M., Ware was left alone locked in the interview room, but under no restraint within the room (N. T. 36-37).

11. Between approximately 7:15 P.M. and 7:30 P.M., a stand-up was conducted in the interview room. Ware and three other persons were observed through the mirror window by Mrs. Gandy, wife of the deceased. Green questioned Mrs. Gandy for an hour and a half or two hours, but she was not able to make a positive identification (N. T. 37-38).

12. Between 7:30 P.M. and 10:30 P.M., Ware was left alone locked in the interview room without restraint. At 10:30 P.M. Green took Ware to the polygraph unit in the P. A. B. turning him over to Lt. Barron (N. T. 39-40). Green had told Ware that he wanted him to take a polygraph test concerning the Gandy homicide, but did not warn him of his constitutional rights (N. T. 46-47).

13. Lt. Barron took charge of Ware at 10:35 P.M. and conducted a pre-test interview during which he explained the procedure of the test to Ware. Then he requested that Ware sign an agreement (C-PT3) to take the test, which he did, witnessed by Sgt. Green (N. T. 48-50). No warnings of his constitutional rights were given by Lt. Barron to Ware at any time (N. T. 59-60).

14. Lt. Barron administered the test asking questions relating to the burglary for which Ware had been arrested and to the Gandy homicide (N. T. 52). The test indicated that Ware had intended to rob the occupant of the home where he was arrested (N. T. 54), and that he was not lying in his responses that he had not committed the Gandy homicide (N. T. 55-56). The testing terminated at 11:56 P.M. at which time Lt. Barron spoke with Ware for a few minutes concerning social matters to relax him after the test. Barron did not give Ware the results of the test (N. T. 58). Between 12 midnight and 1:00 A.M., Septem-

ber 28, Ware was left alone in the examination room while Lt. Barron analyzed the charts and explained the results to the investigator, Sgt. Green (N. T. 57). At 1:00 A.M., Ware was again turned over to Green.

15. At 1:00 A.M. Det. Roberts and Sgt. Green took Ware back up to the Homicide Division. At that time it was decided that Ware was officially no longer a suspect in the Gandy homicide and he left the Homicide Unit in the custody of Det. Roberts (N. T. 42-44).

16. On Saturday, September 28, at 9:00 A.M., Paul Ware received a preliminary hearing on the burglary charge for which he had been arrested before Magistrate Mongelluzo in the 22nd Police District Headquarters (N. T. 19). Ware was held without bail for court (N. T. 30).

17. Det. Roberts took Ware to the major theft unit, robbery and burglary detail, at the P. A. B., after the preliminary hearing. Between approximately 11:00 A.M. and 12 Noon, Det. William J. Connolly of that unit and Det. Roberts questioned Ware in an interview room. They discussed unsolved robberies and burglaries which had occurred in the North Central area and were listed in a police journal (N. T. 63-65; 187). During this questioning, Ware was not restrained and appeared calm and cooperative (N. T. 65, 67, 68). After about one half hour, Ware admitted participating in other burglaries and since he could not recall the addresses offered to point out the locations if they would take him out on the street (N. T. 66, 67, 79).

18. Between approximately noon and 4:30 P.M. on Saturday, September 28, Det. Roberts and Det. Connolly drove Ware around the North Central area. In the course of that drive, Ware pointed out twelve locations which he admitted robbing and gave details of the homes and victims of each crime. These twelve locations were in fact listed in the unsolved burglary journal (N. T. 68, 69, 188).

19. On returning to the P. A. B., formal statements concerning the twelve robberies were taken and completed at approximately 7:00 P.M. At 7:20 P.M., Ware was placed in a police wagon for return to Holmesburg Prison (N. T. 189).

20. On Tuesday, October 2, Ware received a hearing on five additional cases in the 22nd Police District Headquarters (N. T. 21). After the hearing Det. Roberts told Ware —"he had all these already on him, he might as well get rid of the rest of them." Ware at first said no, but then volunteered to point out more locations (N. T. 191-192).

21. At this point, approximately 1:15 P.M., Ware wrote a letter (C-PT13) to his aunt and gave it to Det. Roberts for delivery. In the letter Ware wrote: "I am going to level with the police and I'm going to tell them all that I have done in the past three years. This is the only way out" (N. T. 196-198).

22. Ware was again taken for a tour of the North Central and adjoining areas where he pointed out twenty-four additional locations he had burglarized. This trip extended from the early afternoon to early evening. Between 9:00 P.M. and approximately midnight, a formal written statement was taken covering the twenty-four burglaries plus three more which Ware then recalled. Shortly before midnight Ware was sent back to Holmesburg Prison (N. T. 74-75; 192-195).

23. On Wednesday, October 2, 1963, Det. Albert Krimmel obtained a writ permitting him to bring Ware from Holmesburg Prison to the Homicide Division at the P. A. B. for questioning in relation to the homicide of Dr. James Kalbach. Det. Krimmel was motivated by a feeling that the Kalbach homicide was a crime with characteristics similar to those of the crimes which Ware had admitted. Krimmel and two other detectives picked Ware up at Holmesburg

at 1:00 P.M. and on arrival at the P. A. B. at 1:40 P.M., placed him in an interview room (N. T. 87-90).

24. There had been no interrogation during the ride from Holmesburg. The interrogation commenced at 1:40 P.M. in the interview room with no warning of constitutional rights given first. Det. Kinsey and Det. Sergner were also present, but only Det. Krimmel conducted the interrogation (N. T. 90-91).

25. The interrogation lasted from 1:40 P.M. to 4:00 P.M. Det. Krimmel told Ware that he was being questioned in regard to the Kalbach homicide. The first half of the period was primarily taken up by a discussion of Ware's social philosophies and Muslim religious beliefs. Ware did most of the talking and this period was marked by Ware's hostility toward Krimmel as a caucasian. Krimmel sympathized with Ware's statements and the hostility progressively subsided (N. T. 92, 93, 95).

26. The topic of the conversation shifted toward the crime as Krimmel asked Ware how he had picked the victims of the burglaries he had admitted. Ware explained that by the appearance of the home and other factors he could tell if the residents were elderly white people in the predominantly negro neighborhoods and that he only took money or other objects which could not be traced. Krimmel commented that Ware was clever and Ware's hostility continued to diminish. Ware also explained that he used the money that he had stolen to take trips to visit Muslim mosques in other cities (N. T. 93-96).

27. Krimmel specifically asked Ware if he was responsible for the Kalbach death and Ware denied it. Then at about 3:25 P.M. Ware admitted entering the Kalbach home to steal money, not to kill, and placing a dresser above the victim to afford himself time to escape. This explanation was consistent with the facts of the case except that the

victim had actually been wedged in by the dresser lying on his body whereas Ware said that the victim had room to move and that the dresser was leaned against the wall above the victim. Ware also accurately described the scene of the crime. This discussion ended at 4:00 P.M. (N. T. 97-100).

28. At the request of Det. Krimmel, Ware made a handwritten statement, two pages in length, detailing the admissions he had already made orally concerning the death of Dr. Kalbach. This took place between 4:00 P.M. and 4:20 P.M. (N. T. 102-108).

29. Between 4:20 P.M. and 4:35 P.M. Ware was permitted to get a drink of water, go to the men's room and walk around. At 4:35 P.M. Ware was given a meal consisting of a platter, two containers of milk and a pie. This rest period continued until 5:02 P.M. (N. T. 108-111).

30. At 5:02 P.M. the interrogation resumed as Krimmel told Ware that they were going to question him about the death of Daniel Gandy of which Ware then denied having any knowledge. The pattern was much the same as in the Kalbach interrogation. Ware was initially very hostile and the first forty-five minutes to an hour was consumed by discussion of his philosophy. Then the topic shifted to Krimmel's feeling that the Gandy crime was similar to those which Ware had already admitted and that Ware had also committed that crime. At about 6:30 P.M. Ware indicated he had been involved. The conversation continued until 7:12 P.M. as Ware described the scene and circumstances of the crime. The interrogator, Det. Krimmel, had no knowledge of the details, but later learned that they were accurate (N. T. 111-118). Between 7:12 P.M. and 7:31 P.M. Ware made a handwritten statement of the same nature as that taken concerning the Kalbach death (N. T. 118-123).

31. Between 7:32 P.M. and 7:45 P.M. Ware was allowed to walk around in the large main room and was given two cartons of milk (N. T. 141).

32. At 7:45 P.M. Det. Krimmel commenced questioning concerning the death of Florence Grauley. This death was at the time listed as accidental by the Medical Examiner, but the circumstances were similar to those in the crimes admitted by Ware, so the suspicions of the police were aroused (N. T. 142-143).

33. Between 7:45 P.M. and 9:00 P.M. the conversation was marked by Ware's hostility toward Det. Roberts and Det. Kinsey for being negroes who had aligned themselves with the law enforcement establishment. The police sympathized with him and the hostility reduced. The discussion progressed from Ware's anti-white philosophy into his modus operandi. He said that his choice of elderly victims was motivated by the consideration that he would meet less resistance and the crime would be easier. At about 9:00 P.M. he first admitted complicity in the Grauley crime and between then and 9:30 gave a detailed factual statement orally (N. T. 142-148). Between 9:30 P.M. and 9:50 P.M. Ware made a handwritten statement similar in nature to the other ones he had made (N. T. 148-50).

34. Between 9:50 P.M. at 10:11 P.M. Ware was rested. He was permitted to exercise by walking around the large room. He was given water and went to the men's room. He was offered a meal but declined it (N. T. 151-152).

35. At 10:11 P.M. Det. Krimmel began the questioning of Ware in the presence of Det. Roberts and Det. Kinsey, concerning the death of Leonard Clark. The circumstances of this crime were similar to those in the other crimes except that this one took place in another part of the city. The period of hostility was shorter and less intense this time. Ware allowed the topic to shift to the specifics of the

Clark death at about 10:30 P.M. when he began giving details of the interior of the Clark home and otherwise admit complicity. Again, Det. Krimmel was not familiar with the details of the crime so he could not possibly have been leading Ware or in any way suggesting the facts which Ware was admitting, all of which were later corroborated (N. T. 152-155). At 11:00 P.M. Krimmel felt he had enough factual information and asked Ware to make another handwritten statement which he did between 11:00 P.M. and 11:15 P.M. (N. T. 155-157).

36. Between 11:15 P.M. and 11:40 P.M. Ware was rested again. He was offered food, but requested only milk and was given two cartons (N. T. 158).

37. The police asked Ware if he would give a formal statement which would be typewritten and he readily agreed (N. T. 160). Det. Krimmel did the questioning in the presence of Det. Roberts and Det. Kinsey, and the statement was recorded by Miss Serody, a police stenotypist (N. T. 160-161). In each statement Ware indicated that he knew why he was being questioned (N. T. 162), and that he was willing to give a voluntary statement concerning his knowledge of the crime (N. T. 163). He was informed each time that anything he might say could be used against him at trial and he responded that he understood and that he still was willing to make a voluntary statement (N. T. 163). Ware then narrated essentially the same description he had given previously in the interrogations and handwritten statements. The taking of the formal statements began at 11:40 P.M., Wednesday, October 2, and was completed at 2:40 A.M., Thursday, October 3. Between 2:40 A.M. and 4:20 A.M. Ware made corrections, read each statement aloud, his voice being recorded on tape, and signed each one (N. T. 164-166).

38. During the period when the formal statements were being taken from 11:40 P.M. to 4:00 A.M. there was no

prolonged rest period, however, there were numerous short breaks occasioned by practicalities such as changing the paper in the typewriter. Thus, the interrogation was far from continuous (N. T. 166).

39. As each formal statement was taken photographs were shown to Ware and he was asked to identify them as to whether they were the scene he was describing. On identifying each of the four, Ware initialed the pictures (N. T. 167).

40. Between 4:02 A.M. and 4:05 A.M. after the entire process of interrogation and statement taking was complete, Ware was taken into the large main room where a full length photograph (C-PT8) was taken of him (N. T. 168-169).

41. Between 4:05 A.M. and 5:30 A.M. Ware was driven around and he directed the police to each of the four crime scenes and identified them (N. T. 170-172).

42. At 5:30 A.M. the police caravan arrived at the 23rd District from its tour of the crime scenes. Mr. Richard Sprague of the Office of the District Attorney desired to speak to Ware concerning the charges and police treatment of the defendant. Ware insisted on the presence of a member of his own race and Sgt. Johnson, who had no previous contact with the case, was brought in. Sprague informed Ware that he was being charged with the murder of the four people and inquired of his treatment by the police. Ware said that he understood the charges and that he had been treated without force, abuse or violence and that the statements were not the product of force, threats or promises (N. T. 172-174; 207; 212).

43. At 5:35 A.M. Ware was slated on the charges in the 23rd Police District and at 5:40 A.M. Detectives Krimmel,

Roberts and Kinsey took Ware from the police station for return to Holmesburg Prison (N. T. 175).

44. Dr. Bernard Willis of Farview State Hospital, where Ware has been committed since December of 1963, testified that he could not with certainty give an opinion as to Ware's mental condition at the time the statements were given. He did feel that Ware had been suffering from some mental disorder at that time, but not as serious as when he first examined Ware in December of 1963. He described the situation as one of rapid deterioration. In answer to questions by the Court, Dr. Willis expressed the opinion that Ware would have realized he was under suspicion for serious offenses, that he would at least have had intellectual appreciation of the fact that admissions on his part could be used by the authorities against him, and that his illness, whatever it was, probably had no degree of compulsion with it that would make him act against his own interests (N. T. 130-137).

ARGUMENT.

1. The Statements Both Oral and Written Were Made Voluntarily.

It has been long recognized that the fourteenth amendment to the United States Constitution prohibits the use of an involuntarily given confession to convict a defendant. *Fikes v. Alabama*, 352 U. S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957); *Watts v. Indiana*, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); *Brown v. State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936). The United States Supreme Court has undertaken to review the voluntariness of confessions used in state prosecutions since *Brown v. State of Mississippi*, supra, in 1936. "The standard of voluntariness which has evolved under the Due Process Clause of the Fourteenth Amendment is the same general standard

which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination." *Malloy v. Hogan*, 378 U. S. 1, 6-8, 84 S. Ct. 1489, 1492-3, 12 L. Ed. 2d 653 (1964); *Davis v. State of North Carolina*, 384 U. S. 737, 740, 86 S. Ct. 1761, 1764, 16 L. Ed. 2d 895 (1966). Ours being an accusatory not an inquisitorial system, the concern is not primarily that the involuntary statement will be untrue, but that the right of the individual not to convict himself out of his own mouth may be violated. *Miranda*, supra; *Chambers v. State of Florida*, 309 U. S. 227, 235-8, 60 S. Ct. 472, 476-7, 84 L. Ed. 716 (1940).

With this orientation toward the problem, the inquiry is centered on the suspect, and on the police only so far as their conduct affects the mental and physical state of the suspect. Thus, any given police activity, be it shockingly improper or scrupulously circumspect, is not the sole measure of voluntariness of the confession. *Malloy v. Hogan, supra; Bram v. United States*, 158 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897). The focus is the state of the suspect, which is the result of many factors of which police conduct is only one. In making this subjective determination of voluntariness the range of judicial inquiry is broad and the judgment must be based upon consideration of *the totality of the circumstances*. *Reck v. Pate*, 367 U. S. 433, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961); *Blackburn v. Alabama*, 361 U. S. 199, 206, 80 S. Ct. 274, 280, 4 L. Ed. 2d 242 (1960); *Fikes v. Alabama*, supra; *Commonwealth ex rel. Corbin v. Myers*, 423 Pa. 243, 223 A. 2d 738 (1966); *Commonwealth v. Cheeks*, 423 Pa. 67, 223 A. 2d 291 (1966); *Commonwealth ex rel. Gaito v. Maroney*, 422 Pa. 171, 220 A. 2d 628 (1966); *Commonwealth v. Brown*, 309 Pa. 515, 164 A. 2d 726 (1933). "The nature of the question presented is such that 'no single litmus-paper test for constitutionally impermissible interrogation has been evolved . . .' *Culombe v. Connecticut*, 367 U. S. 568, 601, 81 S. Ct. 1860, 1878, 6 L. Ed. 2d 1037, 1057 (1961)." *Commonwealth ex rel. Gaito v. Maroney*, supra. Thus, the ultimate factual determination

is a conclusion as to whether any one, or all the factors together, resulted in the overbearing of the suspect's will such that the confession was not the result of a free and voluntary self-determination to speak. *Lynumn v. Illinois*, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963); *Malloy v. Hogan*, supra; *Townsend v. Sain*, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Columbe v. Connecticut*, supra; *Rogers v. Richmond*, 365 U. S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); *Blackburn v. Alabama*, supra; *Bram v. United States*, supra; *Commonwealth ex rel. Gaito v. Maroney*, supra.

The court is free to consider any factor which it believes might have had some effect on the physical and mental state of the suspect at the time the confession was made. The cases reveal a wide range of the potentially infinite number of factors which might contribute to the atmosphere, environment, or, as the courts have called it, the totality of circumstances in which the statement was made. Among them are: whether the suspect was warned of his constitutional rights; the length of the interrogation period both as to continuous hours in one day and as to the number of days in which interrogation occurs; physical abuse by the authorities; granting of sufficient nourishment, water, rest and sleep and access to sanitary facilities; the number of police officers performing the interrogation and the environment of the questioning, such as size and lighting of the room; the presence of or opportunity to see friends, relatives or legal counsel; the making of threats or promises such as withholding rest or rights or assuring that a relative will be left out of it, until a confession is made; the existent mental and physical health of the suspect at the time of the confession; the psychological tactics and pressures applied by the authorities.

A review of the testimony elicited at the suppression hearing yields a picture of the "totality of the circumstances" in this case. At no time was Ware effectively warned of his constitutional rights (F. F. 4, 8, 12, 13, 24).

At no time were any threats, promises or other improper influences brought to bear upon Ware. At all times Ware was given adequate food and liquid nourishment (F. F. 29, 31, 34, 36). At all times Ware was adequately rested both in terms of daily sleep and breaks in periods of interrogation (F. F. 29, 31, 34, 36, 38). At no time during the interrogations was Ware held under restraints or in a state of physical discomfort for any reason. All interrogations leading to the murder confessions occurred in an interview room in the Police Administration Building (F. F. 7). Two or three officers were normally present, but only one conducted the interrogation (F. F. 24). There were four days during which interrogation occurred spaced out over a six day period with a combined total of approximately twenty hours of questioning. A large proportion of the time was consumed by Ware's own rambling monologues concerning his beliefs. No single uninterrupted period of actual questioning by the police lasted longer than three hours. The first murder confession occurred after less than two hours of the interview, most of which consisted of one of Ware's monologues. At no time did Ware have the benefit of the presence of friends, relatives or legal counsel, but at no time did he make such a request. His one request to transmit a letter to an aunt was promptly satisfied (F. F. 21). Nothing adverse about his physical condition was indicated. Though his mental health was in doubt at the time the statements were given, nothing was educed which might indicate that he did not understand the consequences of his statement or which would compel him to act against his will (F. F. 44).

The totality of circumstances in this case, as outlined in the previous paragraph, does indicate the kind of potential for compulsion which concerned the Supreme Court in *Miranda*, supra, 384 U. S. at 457, 86 S. Ct. at 1618. The *Miranda* warnings were not given during the various interrogations which occurred nearly three years prior to that landmark decision. Even before *Miranda*, the absence of warnings was a significant, critical factor to the admissi-

bility of a confession, but was not in itself conclusive. *Davis v. North Carolina,* supra; *Johnson v. State of New Jersey,* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 1772 (1966); *Haynes v. Washington,* 373 U. S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *Spano v. New York,* 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); *Commonwealth v. Bishop,* 425 Pa. 175, 228 A. 2d 661 (1967); *Commonwealth ex rel. Mumford v. Cavell,* 423 Pa. 280, 223 A. 2d 852 (1966); *Commonwealth ex rel. Corbin v. Myers,* supra; *Commonwealth v. Cheeks,* supra. No case has ever decided the voluntariness issue solely on the basis of the absence of the warnings. *Miranda* has made that factor absolutely controlling for all cases covered by that decision but did so as a prophylactic measure. The intent was not to declare that the existence of that factor was enough to declare the statement involuntary. The court there said that the confessions it was invalidating therein might well be voluntary in the traditional sense. Thus, in considering the voluntariness of a confession aside from the *Miranda* rule, the absence of warnings is merely one of the many factors in the panoramic view.

"There is no doubt that the mental state of the accused is a relevant factor in determining voluntariness, as it bears on his ability to resist questioning." *Commonwealth v. Walker,* 433 Pa. 124, 127, 249 A. 2d 283, 286 (1969). Conditions of interrogation not alone negating voluntariness may be sufficient when combined with a mental state of the accused which makes him susceptible to pressure which would not overcome the will of a man of normal mental faculties. In *Blackburn v. Alabama,* supra, the accused was subjected to the pressures of an interrogation for a sustained period of eight or nine hours in a tiny room filled with police officers without the benefit of the presence of a friend, relative or legal counsel. The evidence established the strongest probability that Blackburn was insane and incompetent at the time of the confession. This Court was most concerned and sensitive to the factor of Ware's

mental state as it related to the conditions of his interrogation and ultimately to the voluntariness of his confession. However, the record is devoid of testimony which might allow us to find that Ware's admittedly defective mental state had any effect on his ability to resist questioning or that it caused him to be particularly susceptible to the pressure of interrogation. The defense had opportunity to present any such testimony it had available but limited itself to the cross-examination of Dr. Willis which indicated that the mental defect present in Ware would not have impaired his ability to understand the consequences of his making the confessions and would not have caused him to act contrary to his own will or personal interest (F. F. 43). We must decide the issue only on the basis of the testimony before us and we find that the record is insufficient to support a finding that the mental state of Paul Ware was a substantial factor tending to show that the confessions were involuntary.

In this case we find that the totality of circumstances indicates that the confessions were voluntary. The conditions under which Ware was interrogated seem eminently fair and far from the extreme treatment evident in cases where the courts have invalidated confessions.*[2] All police interrogations take place in what the Miranda court called a "police dominated atmosphere", but here, where only one officer did the questioning, the suspect was allowed to speak at length, third degree methods were not employed, and the periods of interrogation were of reasonable length, the situation was not one which the courts have traditionally found as one overbearing the will of the suspect.

---

*[2] Contrast this situation to that in **Fikes v. Alabama**, supra, where the accused was removed to a prison eighty miles from his home and his father and lawyer refused permission to see him; to **Lynumn v. Illinois**, supra, where the accused was coerced by the threat that her children would be taken from her; and to **Haynes v. Washington**, supra, where the accused was denied his persistent requests to contact his wife or attorney.

After reviewing the "totality of the circumstances" we must conclude that the statements, both oral and written, were voluntary.

2. The Miranda Decision Is Not Applicable to the Case At Bar.

Having determined the statements of this defendant during custodial interrogation to have been voluntary it is now incumbent upon us to determine the applicability of *Miranda v. Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

The Supreme Court of the United States departed from the Blackstonian view that all constitutional decisions must apply retroactively to all who still have standing to litigate the issue and determined that in criminal litigation as to rules of procedure reaching constitutional stature "the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such an application." *Linkletter v. Walker*, 381 U. S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); *Tehan v. Shott*, 382 U. S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459 (1966). In *Johnson v. New Jersey*, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966), the Court, in affirming the right to deny retroactivity stated:

> "We stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved . . . we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." (384 U. S. to 728).

In making the determination as to whether the new rule is to be given retroactive application the Court in *Linkletter*, supra, suggested that the factors to be considered are: (a) the degree to which the new rule affects the reliability of the fact finding process; (b) the reliance of law enforcement officials; and (c) the effect on the administra-

tion of justice. In *Desist v. U. S.*, 394 U. S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), the Court observed:

> The criteria guiding resolution of the question implicate: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Foremost among these factors is the purpose to be served by the new constitutional rule. (394 U. S. at 249.)

At a later point in the same decision, the Court stated:

> It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only where the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. (394 U. S. at 251.)

The *Johnson* court, reflecting upon the first element of the formula had no difficulty in arriving at the conclusion that the purpose of the *Miranda* rule did not clearly favor retroactivity.

> In the light of these various considerations, we conclude that *Escobedo* and *Miranda*, like *Mapp v. Ohio*, supra, and *Griffin v. California*, supra, should not be applied retroactively. (384 U. S. at 732.)

The considerations were that "while *Escobedo* and *Miranda* guard against the possibility of unrealiable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." The Court stressed that "our case law on coerced confessions is available for persons whose trials have already been completed." The Court concluded that although *Miranda* provided new safeguards "the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

In considering the reliance by law enforcement authorities the Court was of the view that this too would suggest that the new rule should not be applied retroactively:

> Prior to *Escobedo* and *Miranda*, however, we had expressly declined to condemn an entire process of incustody interrogation solely because of such conduct by the police. Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. (384 U. S. at 731.) (Citations omitted.)

The Court was also of the view that retroactive application of the new rules would seriously disrupt the administration of our criminal laws.

Having concluded after weighing the accepted standards that the decision should not be given retroactive application our instant problem would have been resolved if the Court consistent with this reasoning had determined to give the new rules purely prospective effect (limiting their benefits to future defendants excluding even the defendants in the case in which the rule was announced). This possibility was eliminated by the *Miranda* decision itself which bestowed the protection of the new rule upon the party litigant. After deciding that *Miranda* would not apply to cases still on direct appeal when it was decided, the Court ruled that its application should commence with trials begun after the decision was announced. Despite the eloquent and persuasive logic of the majority of the *Johnson* Court in demonstrating the propriety of their decision to refuse retroactive application, experience has revealed that the selection of the date of trial as the crucial moment produced a significant retroactive aspect.

The defense and the amicus would urge us to look no further and accept *Johnson* as a mandate to apply *Miranda* to all matters where the trial commenced after that decision had been announced. Such specious reasoning would only lead to the transformation of an initially wise and fair de-

cision into an untenable and arbitrary rule. It would be most unjust and intellectually dishonest to ascribe to the *Johnson* Court a blanket approval of retroactivity to those cases yet to be tried when the entire decision was devoted to a scholarly and meticulous explanation why *Miranda* should be denied retroactive application. It is our view that *Johnson's* holding simply stated that *Miranda* doesn't apply to trials beginning prior to June 1966. We must reject the contention that it supports the proposition that requires its application in all trials subsequent to that date.

Some explanation of the decision to select the trial as the operative event is found in the majority opinion in *Jenkins v. Delaware*, 395 U. S. 213, 23 L. Ed. 2d 253, 89 S. Ct. 1677 (1969).

> On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. But, in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. (395 U. S. at 219.)

The Court was apparently reassured as to the wisdom of their selection laboring under the view that the commission and investigation of a crime would be sufficiently proximate to the commencement of the trial that, where necessary, evidentiary substitutes could be obtained by reopening the investigation.

While it is quite true that the Court envisioned certain incongruent results from their selection of the trial date, it is equally true that they were then referring to the possibility that one defendant might benefit from the new rule while another may not "solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment." As the Court had previously indicated in *Johnson* its willingness to deny the benefit of the new rule to all sprung from its view that

prior case law as it had developed provided adequate redress for persons who would not receive the protections of the new edict.

Here, our concern is not the disparity of treatment of defendants who commit criminal acts contemporaneously, but rather the complete frustration of law enforcement officers who elicit incriminating statements relying on the law then existent. As the *Johnson* Court recognized that there was adequate safeguards to protect the defendant who was not protected by the new rule that same court realized the havoc the storm of retroactivity would work on the administration of our criminal laws (*Johnson v. New Jersey*, supra, at 731).

The defense and the amicus cite the following passage as support for their view, that there should be blanket coverage for trials after the stated date.

> In short, petitioner's concern for what he refers to as "visible imperfection in a judicial process" merely highlights the problems inherent in prospective decision making, i.e., some defendants benefit from the new rule while others do not, solely because of the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practically effected. (395 U. S. at 217-218.)

To construe this language as meaning that the Court had weighed *all of the distortions that might result* from the selection of the trial as the operative date and balanced it as suggested in *Linkletter* and *Desist*, and then determined that *Miranda must* apply in all instances in trials after the effective date is a clear distortion of the obvious intendment of the words. This language means simply that the Court had discounted the fact that certain defendants would receive protection and others would not in light of the need for the new rules *and also their desire not to disturb completed trials.*

This Court finds that neither *Jenkins* nor *Johnson* passed upon the applicability of *Miranda* to trials where delay has resulted in removing the possibility of obtaining substitute evidence and its application would completely frustrate the attempt to prosecute the felon. We are not shaken in this opinion by the *Jenkins* Court's recognition that there would be exceptions where the commission and investigation of crime would not be sufficiently proximate to the commencement of the trial to allow for the reopening of the investigation. The recognition of a situation is obviously not synonymous with its acceptance. It is a non-sequitur to conclude that, because the Court anticipated that there would in *some instances* be cases where delay would create an injustice, this necessarily requires the conclusion that the Court accepted this result. In the context in which this particular statement was made the Court was attempting to emphasize the lack of disruption to the administration of justice rather than consider those situations where delay had created a problem. Attempting by torturing the language of *Johnson* and *Jenkins* to find a specific answer to our present concern is quite similar to the vain efforts of many courts prior to the *Jenkins* decision to find the answer concerning retrials from the language of *Johnson*.

There being no U. S. Supreme Court pronouncement on the subject and from our investigation no other controlling or compelling appellate decisions on point, we must now decide the cause attempting to find direction from the general philosophy the Supreme Court has provided in this area. Accepting the Supreme Court's finding that the purpose of the rule in question favors prospectivity we must conclude whether there is any reason or policy that should dictate the applicability of the new rule to the instant case. Here, a number of years have intervened between arrest and investigation and the commencement of trial. The possibility of reopening the investigations and obtaining evidentiary substitutes is non-existent. The application of the new rule in this instance would in effect release the

defendant albeit his clear involvement in four separate murder-robberies.

We cannot at this juncture ignore the fact that the delay was in no way occasioned by law enforcement agents. Even though we accept that the defendant cannot be held accountable for an act of God it is significant in determining the effect upon the administration of justice and the effect of law enforcement officials' reliance to note that the delay was not the fault of those officials.

In *Jenkins*, the Court attempted to explain its departure from its basic premise that the new rule should be for the benefit of "future defendants" stating that the scope of retroactivity was limited to instances where there would be no betrayal of reliance or frustration of the administration of justice. A retroactive application in the instant factual situation would produce the opposite result. We feel compelled from the logic of *Johnson* and *Jenkins* to conclude that the philosophy of these decisions is incompatible with the result urged here by the defense. Further, we have been given no logical reason or policy consideration to alter our view. The Court in both *Johnson* and *Jenkins* expressed its confidence in the case law prior to *Miranda* to afford protection to the defendant against the coerced and involuntary confession. We share this belief. Applying *Miranda* in this instance would provide a damaging blow to the administration of justice and completely ignore the welfare and the safety of the citizens of this community.

For the reasons set forth in this opinion, it is our holding that the confessions were voluntarily made and are not barred by *Miranda*.

ORDER.

AND NOW, to wit, this 13th day of November, 1970, it is ORDERED and DECREED that defendant's Application to Suppress his written and oral statements is denied.

BY THE COURT:

NIX,
J.

APPENDIX D.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	No. 247 January Term, 1971.
v.	Appeal from the Order of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section at Nos. 328, 343, 345, 349 of December Term, 1963.
PAUL D. WARE, Appellant	

OPINION OF THE COURT.

ROBERTS, J. Filed: December 20, 1971

The Commonwealth in this appeal calls upon this Court to hold the federal constitutional standards of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), inapplicable to a 1963 confession sought to be introduced in a post-*Miranda* trial. This contention must be rejected. It ignores the controlling and unambiguous pronouncements of the United States Supreme Court concerning the extent of *Miranda's* retroactivity. These pronouncements have been scrupulously followed not only by an unbroken line of decisions of this Court[1] but also by virtually every other court in the nation which has dealt with the issue.[2]

The procedural history of the present appeal is as follows: On October 3, 1963, appellant Paul Ware confessed to the commission of four murders. The statements were elicited from him in the course of custodial interrogation and were not preceded by the warnings of constitutional rights mandated by *Miranda*. A murder indictment was returned against appellant in December of 1963, but further prosecution was postponed as a result of his commitment to Farview State Hospital pursuant to a court order declaring him to be mentally incompetent to stand trial.

In July of 1967, appellant was found to have regained his competency, and his case was listed for trial. However, on May 23, 1968, the Philadelphia Court of Common Pleas ordered the 1963 confessions suppressed for the reason that they had been obtained in circumstances violative of *Miranda*. In light of the suppression order and the absence of other independent evidence of appellant's guilt, the Com-

---

[1] See cases cited page 4, infra.

[2] See cases cited footnote 5, infra.

monwealth petitioned for the entry of a nolle prosequi. Appellant offered no objection, and the court approved the nolle prosequi.

On August 11, 1969, more than one year after the original suppression order and nine months after the entry of the nolle prosequi, the Commonwealth changed its position and moved for removal of the nolle prosequi. The motion was granted over appellant's objection, and the Commonwealth then petitioned the court to vacate its prior suppression order and allow a rehearing of the matter. This request was likewise granted over objection, and a suppression hearing was held on June 25 and June 26, 1970. On November 13, 1970, the court of common pleas held that the confessions were admissible in evidence notwithstanding the conceded absence of *Miranda* warnings. This appeal followed.[3]

The Commonwealth argues in defense of the trial court's suppression order that the standards of *Miranda* should not apply to a confession obtained prior to the date of that decision. We need not, however, respond to the Commonwealth's view as to what "should be": to put it quite simply, the matter is no longer an open question.

In *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), the United States Supreme Court was squarely confronted with the question whether and to what extent

---

[3] This interlocutory appeal was allowed pursuant to Section 501(b) of the Appellate Court Jurisdiction Act of 1970, P. L. ——, No. 223, art. V, 17 P. S. §211.501(b). Section 501(b) provides in pertinent part as follows:

> "When a court or administrative agency, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the matter, it shall so state in such order. The appellate court may thereupon in its discretion permit an appeal to be taken from such order."

The certification required by Section 501(b) was made by the court of common pleas on December 1, 1970 upon the joint petition of appellant and the Commonwealth.

Miranda should be accorded retroactive application. After carefully analyzing the material considerations,[4] the Court concluded:

> "We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago."

Id., at 721, 86 S. Ct. at 1775.

We cannot imagine how the Supreme Court could possibly have spoken more definitively. That Court made it clear that the date of *trial* is the operative event, and that therefore the *Miranda* standards must be applied to all post-*Miranda* trials, including those cases such as the present one involving pre-*Miranda* confessions. This Court has not only faithfully honored the United States Supreme Court's clear directive, see *Commonwealth v. Davis*, 440 Pa. 123, 270 A. 2d 199 (1970); *Commonwealth v. Singleton*, 439 Pa. 185, 266 A. 2d 753 (1970); *Commonwealth v. Bennett*, 439 Pa. 34, 264 A. 2d 706 (1970); *Commonwealth v. Ware*, 438 Pa. 517, 265 A. 2d 790 (1970); *Commonwealth v. Yount*, 435 Pa. 276, 256 A. 2d 464 (1969), cert. denied, 397 U. S. 918, 90 S. Ct. 918 (1970); *Commonwealth v. Williams*, 432 Pa. 557, 248 A. 2d 301 (1968); *Commonwealth v. Bordner*, 432 Pa. 405, 247 A. 2d 612 (1968); *Commonwealth v. Leaming*, 432 Pa. 326, 247 A. 2d 590 (1968); *Commonwealth v. Robinson*, 428 Pa. 458, 239 A. 2d 308 (1968); *Commonwealth v. Sites*, 427 Pa. 486, 235 A. 2d 387 (1967),[5]

---

[4] "We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of **Escobedo** and **Miranda.**" 384 U. S. at 727, 86 S. Ct. at 1777.

[5] Nor, we might add, has our interpretation of **Johnson** been unique. See **Posey v. United States**, 416 F. 2d 545, 549 (5th Cir. 1969); **Sheer v. United States**, 414 F. 2d 122 (5th Cir. 1969); **Comacho v. United States**, 407 F. 2d 39 (9th Cir. 1969); **United States v. Fox**, 403 F. 2d 97 (2d Cir. 1968); **United States v. Vanterpool**, 394 F. 2d 697 (2d Cir. 1968); **Groshart v. United States**, 392 F. 2d 172 (9th Cir. 1968); **Evans v. United States**, 375 F. 2d 355 (8th Cir. 1967); **Rolland v. Michigan**, 320 F. Supp. 1195 (E. D. Mich. 1970); **Griffith v. Jones**, 283 F. Supp. 794

but we adopt the *Johnson* position as a matter of state law.

The Commonwealth would have us abandon the foregoing state and federal case law on the ground that the trial date language in *Johnson* was merely "ill-considered" and "inadvertent" dicta. We are unpersuaded.

In the first place, a state court is not free to ignore the dictates of the United States Supreme Court on federal constitutional matters because of its own conclusion that those dictates are "ill-considered." Even if this or any other court should disagree with the views of the United States Supreme Court on a particular constitutional issue, those views are binding. See, e.g., *Commonwealth v. Williams*, 432 Pa. 557, 568 n. 8, 248 A. 2d 301, 307 n. 8 (1968).

In the second place, we do not believe that the Supreme Court was speaking "inadvertently" when it stated five separate times in *Johnson* that *Miranda* should apply to all post-*Miranda* trials.[6] Any possible doubts in this regard

---

(N. D. Ga. 1967); **Commonwealth v. Bujnowski**, 267 N. E. 2d 924 (Mass. App. 1971); **Young v. State**, 234 So. 2d 341 (Fla. 1970); **State v. Anderson**, 229 So. 2d 329 (La. 1969); **State v. Butler**, 249 N. E. 2d 818 (Ohio 1969); **State v. Knott**, 249 A. 2d 421 (R. I. 1969); **Guyette v. State**, 438 P. 2d 244 (Nev. 1968); **People v. Peacock**, 287 N. Y. S. 2d 166 (N. Y. App. 1968); **State v. Wong**, 430 P. 2d 330 (Hawaii 1967); contra **State v. Lewis**, 164 S. E. 2d 177 (N. C. 1968) (semble); **Clark v. Smith**, 164 S. E. 2d 790 (Ga. 1968).

[6] "We hold further that **Miranda** applies only to cases in which the **trial** began after the date of our decision one week ago."

* * * * * * * * * *

"All of the reasons set forth above for making **Escobedo** and **Miranda** nonretroactive suggest that these decisions should apply only to **trials** begun after the decisions were announced."

* * * * * * * * * *

"Prospective application only to **trials** begun after the standards were announced is particularly appropriate here."

* * * * * * * * * *

"In light of these additional considerations, we conclude that **Escobedo** and **Miranda** should apply only to **cases** commenced after those decisions were announced."

* * * * * * * * * *

". . . and these guidelines [of **Miranda**] are therefore available only to persons whose **trials** had not begun as of June 13, 1966." 384 U. S. at 721, 732, 733, 734, 86 S. Ct. at 1775, 1780, 1781. (Emphasis added.)

should have been forever put to rest by the Supreme Court's subsequent decision in *Jenkins v. Delaware*, 395 U. S. 213, 89 S. Ct. 1677 (1969), which further clarified and explicitly reaffirmed the principles of *Johnson*:

> "[W]e could have . . . made the point of initial reliance, the moment the defendant is interrogated the operative event. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial.".

Id. at 219, 89 S. Ct. at 1680-81.

Finally, we must reject the Commonwealth's claim that *Johnson* has been overruled *sub silentio* by the Supreme Court's more recent retroactivity cases fixing the date of the alleged constitutional violation rather than the date of trial as the operative cut-off date.[7] There are of course "occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." *Rowe v. Peyton*, 383 F. 2d 709, 714 (4th Cir. 1967). But this is certainly not such a situation. *Johnson's* trial date rule has been reaffirmed by the Supreme Court as recently as April 5, 1971. See *Mackey v. United States*, 401 U. S. 667, ——, 91 S. Ct. 1160, 1164 (1971); *Williams v. United States*, 401 U. S. 646, —— n. 7, 91 S. Ct. 1148, 1153 n. 7 (1971). Therefore we are without constitutional authority to adopt a test for the retroactivity of *Miranda* which is inconsistent with *Johnson*. Additionally, we are in agreement with the rationale

---

[7] See, e.g., **Williams v. United States**, 401 U. S. 646, 91 S. Ct. 1148 (1971), holding **Chimel v. California**, 395 U. S. 752, 89 S. Ct. 2034 (1969), applicable to **searches** conducted after the date of **Chimel**; **Stovall v. Denno**, 388 U. S. 293, 87 S. Ct. 1967 (1967), holding **United States v. Wade**, 383 U. S. 218, 87 S. Ct. 1926 (1967), applicable only to cases where the **lineup** occurred after the decision in **Wade**.

of *Johnson*, and we affirm it as a matter of state law. Cf. *Commonwealth v. Blackman*, —— Pa. ——, —— A. 2d —— (1971).

The order of the Philadelphia Court of Common Pleas is reversed.

MR. CHIEF JUSTICE BELL did not participate in the consideration or decision of this case.

MR. JUSTICE POMEROY did not participate in the consideration or decision of this case.

MR. JUSTICE JONES concurs in the result.

MR. JUSTICE O'BRIEN joins the Opinion of the Court and files a Concurring Opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee v. PAUL D. WARE Appellant	No. 247 January Term, 1971. Appeal from the Order of the Court of Common Pleas, Criminal Trial Division, of Philadelphia at Nos. 328, 343, 345, 349 of December Term, 1963.

CONCURRING OPINION.

O'BRIEN, J. Filed: December 20, 1971

I concur in the opinion of the majority and join in that opinion. In addition, however, I believe that the Commonwealth has followed a procedure in this matter which precludes any result other than the one arrived at by the majority.

As indicated in the majority opinion, the Philadelphia Court of Common Pleas entered its suppression order on May 23, 1968. Since the Commonwealth had no other independent evidence of appellant's guilt, the effect of the suppression order was to put the Commonwealth out of court and the order was, therefore, as indicated by many, many cases, appealable. If the district attorney was unhappy with the suppression order, the proper course of action for him was to appeal that order within the time allowed for such appeals. He did not do so. Instead, nearly fifteen months later, he chose to request a rehearing of the suppression order in the trial court. I do not believe that we can countenance such procedures, and in my view the district attorney's failure to appeal the suppression order within the statutory time period precludes any further consideration of that order.

APPENDIX "E."

The Omnibus Crime Control and Safe Streets Act was passed after extensive congressional hearings which contained testimony, statistics, and other data showing the unduly restrictive effects on law enforcement officers resulting from the *Miranda* decision:

> Statistical evidence further indicates the harmful effects of the *Miranda* decision. During the subcom-

mittee hearings, Arlen Specter, district attorney of the City of Philadelphia, revealed a study on the effects of *Miranda* conducted by his office. The results indicated that prior to the *Escobedo* case, 90 percent of the suspects would make a statement, often not incriminating on their face, but valuable in investigating the crime. After *Escobedo*, only 80 percent would give statements. After the second circuit *Russo* case, only 68 percent of suspects would give statements. Then came the *Miranda* case in June 1966. For a period after *Miranda*, out of 5,220 suspects arrested for serious crimes, 3,095 refused to give a statement. This is a percentage of only 41 percent who would give statements, a decrease of 49 percent since *Escobedo*. These statistics are inclined to become more alarming as more criminals become more familiar with *Miranda*.

Aaron Koota, district attorney for Kings County, N. Y., conducted a similar survey, indicating that prior to *Miranda*, approximately 10 percent of the suspects involved in serious crimes refused to make statements or confessions to police. After *Miranda*, 41 percent refused to make statements or confessions. Specifically, between June and September of 1966, Mr. Koota revealed that 130 of 316 suspects refused to make any statement at all. In only 30 of these 130 cases did Mr. Koota have sufficient evidence to prosecute apart from the confession. Mr. Koota was unequivocal in stating that confessions are helpful in securing convictions.

Charles E. Moylan, Jr., State's attorney for the city of Baltimore, Md., reports more disturbing statistics. Mr. Moylan said:

> * * * [W]e used to get * * * (confessions) in 20 to 25 percent of our cases, and now we are getting * * * (them) in 2 percent of our cases. The confession as a law-enforcement instrument has been virtually eliminated (hearings, p. 622).

Mr. Moylan noted that the *Miranda* case has encouraged criminals, discouraged the police, and disappointed the public that depends on the courts for protection.

Frank S. Hogan, New York County district attorney, reported similar findings. In the 6 months prior to the *Miranda* case, 49 percent of the nonhomicide felony defendants in New York County made incriminating statements. In the 6 months after the decision, only 15 percent of the defendants gave incriminating statements. Mr. Hogan characterized it as being most harmful to efforts to convict criminals who roam our streets and assault our citizens.

* * *

The committee is convinced from the mass of evidence heard by the subcommittee, much of which is printed in the transcript of hearings, that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement. Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt. The transcript and subcommittee files contain testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country, demonstrating beyond doubt the devastating effect upon the rights of society of the *Miranda* decision. The unsoundness of the majority opinion was forcefully shown by the four dissenting justices, who also predicted the dire consequences of overruling what theretofore had been the law of the land, confirmed in 1896 in *Wilson v. U. S.*, 16 S. Ct. 895, 162 U. S. 613, and in 1912 in *Powers v. U. S.*, 32 S. Ct. 281, 223 U. S. 303, and in other more recent Supreme Court decisions.

The Supreme Court itself suggests that Congress is free to enact legislation in this field. The Court's invitation for Congress to act could stem from a widespread notion that Congress is better able to cope with the problem of confessions than is the Court. Senator Bible, in testifying before the subcommittee, observed that experience has taught that Court decisions are too inexact to deal with postarrest problems. The Honorable J. Edward Lumbard, Chief Judge of the U. S. Court of Appeals for the Second Circuit agrees. He states:

> In my opinion, it is most important that the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.
>
> The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.
>
> Judges seldom have before them all those who are best informed regarding practical problems and the difficulties in living with any proposed change in the law. Judges usually are advised only by the parties in the case; the parties want to win the case and do not always care about general principles of wider application.
>
> As I said before, it is because the Congress and the legislatures of the States have taken so little action in the field of criminal justice that the courts have more and more chosen to lay down rules which have the force of law until changed, and which all

too frequently come to us in the form of new constitutional principles which then can be modified only by constitutional amendment (hearings, p. 184).

Mr. Specter expresses a similar view. He pointed out that the subcommittee hearings make it possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions. The courts, in considering only the limited facts and issues of each particular case do not have the opportunity to evaluate all these factors. Passage of this bill with all of its legislative history—the record of the subcommittee hearings and all of the underlying social policies bearing on this issue and taken into account by Congress—will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices. . . .

The committee is of the view that the legislation proposed in section 701 of title II would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors. There is the added safeguard that the jury must be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted only after passing the tests of both court and jury under the above-described safeguards. The committee also feels that a civilized society could not be more fair to persons accused of crime, as the constitutional rights of defendants in

criminal cases would be fully protected and respected by the safeguards in this proposed legislation.

The committee is aware that a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in the majority opinion in *Miranda*. The committee, however, is aware also that the overwhelming weight of the testimony adduced by the subcommittee supported the passage of these provisions of the bill, and that the vast majority of the witnesses expressed no doubt as to the constitutionality of the legislation. The committee is also aware that the opinions of the four dissenting Justices clearly indicate that neither of them would consider these provisions unconstitutional. Justice Harlan, it will be recalled, said the majority opinion "represents poor constitutional law," and that "it would be shared by few."

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices (excerpts from which are heretofore quoted in this report) that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the *Miranda* decision itself was by a bare majority

of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.

Committee Report, P. L. 90-351, Title II, 1968 U. S. Code Congressional and Administrative Laws, pp. 2112-29, 2132-38.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-964.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

PAUL D. WARE,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE WRIT OF CERTIORARI.

Petition for Certiorari Filed January 28, 1972.
Certiorari Granted March 20, 1972.

JAMES T. RANNEY,
Assistant District Attorney,
MILTON M. STEIN,
Assistant District Attorney,
Chief, Apeals Division,
JAMES D. CRAWFORD,
Deputy District Attorney for Law,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

Room 666, City Hall
Philadelphia, Pennsylvania 19107

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

PAGE

Question Presented 1

Argument 2

There is No Independent and Adequate State Ground for the Lower Court's Decision in Pennsylvania v. Ware Because: (1) the Decision of the Pennsylvania Supreme Court, When Read As a Whole, Was Clearly Based Upon What That Court Deemed to be the Constitutionally Required "Controlling and Unambiguous" Decision of this Court in Johnson v. New Jersey, 384 U. S. 719 (1966); (2) Even if the Lower Court's Decision Were Ambiguous in This Respect, the Present Case is One Where Any Supposed State Ground, Far From Being "Independent," Is So Interwoven With the Federal Constitutional Ground That This Court Has Every Reason to Retain Jurisdiction of This Case; and (3) the Question of the Continuing Vitality of Miranda v. Arizona, 384 U. S. 436 (1966) Remains in the Case Since Miranda Has Never Been Adopted As a Matter of State Law in Pennsylvania 2

Conclusion 11

Appendix A 12

Appendix B 28

TABLE OF CITATIONS

PENNSYLVANIA CASE:

Commonwealth v. Ware, 446 Pa. 52 (1971) ..1, 2, 3, 4, 6, 8

FEDERAL CASES:

Jenkins v. Delaware, 395 U. S. 213 (1969) 8

PAGE

Johnson v. New Jersey, 384 U. S. 719 (1966) 1, 2, 4, 6, 8, 10

Miranda v. Arizona, 384 U. S. 436 (1966) . . 1, 2, 6, 8, 9, 10

NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 (1958) 9

Patterson v. Alabama, 294 U. S. 600 (1925) 9

Perkins v. Benguet Mining Co., 342 U. S. 437 (1952) 9

Standard Oil of California v. Johnson, 316 U. S. 481 (1942) 8

State Tax Commission v. Van Cott, 306 U. S. 511 (1939) 8

MISCELLANEOUS:

Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §3501(b) 9

Wright, Law of Federal Courts (2d Ed. 1970) 9

QUESTION PRESENTED.

Is there an independent and adequate state ground for the lower court's decision in *Pennsylvania v. Ware* where: (1) the decision of the Pennsylvania Supreme Court, when read as a whole, was clearly based upon what that Court deemed to be the constitutionally required "controlling and unambiguous" decision of this Court in *Johnson v. New Jersey*, 384 U. S. 719 (1966); (2) even if the lower court's decision were ambiguous in this respect, the present case is one where any supposed state ground, far from being "independent," is so interwoven with the federal constitutional ground that this Court has every reason to retain jurisdiction of this case; and (3) the question of the continuing vitality of *Miranda v. Arizona*, 384 U. S. 436 (1966), remains in the case since *Miranda* has never been adopted as a matter of state law in Pennsylvania?

ARGUMENT.

THERE IS NO INDEPENDENT AND ADEQUATE STATE GROUND FOR THE LOWER COURT'S DECISION IN PENNSYLVANIA v. WARE BECAUSE: (1) THE DECISION OF THE PENNSYLVANIA SUPREME COURT, WHEN READ AS A WHOLE, WAS CLEARLY BASED UPON WHAT THAT COURT DEEMED TO BE THE CONSTITUTIONALLY REQUIRED "CONTROLLING AND UNAMBIGUOUS" DECISION OF THIS COURT IN JOHNSON v. NEW JERSEY, 384 U. S. 719 (1966); (2) EVEN IF THE LOWER COURT'S DECISION WERE AMBIGUOUS IN THIS RESPECT, THE PRESENT CASE IS ONE WHERE ANY SUPPOSED STATE GROUND, FAR FROM BEING "INDEPENDENT," IS SO INTERWOVEN WITH THE FEDERAL CONSTITUTIONAL GROUND THAT THIS COURT HAS EVERY REASON TO RETAIN JURISDICTION OF THIS CASE; AND (3) THE QUESTION OF THE CONTINUING VITALITY OF MIRANDA v. ARIZONA, 384 U. S. 436 (1966), REMAINS IN THE CASE SINCE MIRANDA HAS NEVER BEEN ADOPTED AS A MATTER OF STATE LAW IN PENNSYLVANIA.

The Court has asked petitioner to "respond to respondent's point 4(b) that the decision of the Pennsylvania Supreme Court rests on an adequate, independent state ground."

As set forth in the Commonwealth's Petition for Writ of Certiorari, the Pennsylvania Supreme Court reversed the trial court's decision in this case because of what it considered the "controlling and unambiguous" decision of this Court in *Johnson v. New Jersey*, 384 U. S. 719 (1966). The Court stated: "We need not, however, respond to the Commonwealth's view as to what 'should be': to put it quite simply, the matter is no longer an open question." Com-

monwealth v. Ware, 446 Pa. 52 (1971). Indeed, the Court's holding was set forth in the very first paragraph of its opinion:

> The Commonwealth in this appeal calls upon this Court to hold the federal constitutional standards of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), inapplicable to a 1963 confession sought to be introduced in a post-*Miranda* trial. *This contention must be rejected. It ignores the controlling and unambiguous pronouncements of the United States Supreme Court concerning the extent of Miranda's retroactivity.* These pronouncements have been scrupulously followed not only by an unbroken line of decisions of this Court but also by virtually every other court in the nation which has dealt with the issue. (Footnotes omitted; emphasis supplied.)

Id. at 53. Then, after reciting the facts of this case, the Court began its discussion of the legal arguments as follows:

> The Commonwealth argues in defense of the trial court's suppression order that the standards of *Miranda* should not apply to a confession obtained prior to the date of that decision. *We need not, however, respond to the Commonwealth's view as to what "should be": to put it quite simply, the matter is no longer an open question.*
>
> In *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), the United States Supreme Court was squarely confronted with the question whether and to what extent *Miranda* should be accorded retroactive application. After carefully analyzing the material considerations, the Court concluded: "We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago." *Id.* at 721. 86 S. Ct. at 1775.
>
> *We cannot imagine how the Supreme Court could possibly have spoken more definitively.* That Court made it clear that the date of *trial* is the operative event, and that therefore the *Miranda* standards must be applied

to all post-*Miranda* trials, including those cases such as the present one involving pre-*Miranda* confessions. (Footnote omitted; emphasis supplied.)

Id. at 54-55. Nevertheless, because the Court then went on and said,

> This Court has not only faithfully honored the United States Supreme Court's clear directive, see *Commonwealth v. Davis*, 440 Pa. 123, 270 A. 2d 199 (1970); *Commonwealth v. Singleton*, 439 Pa. 185, 266 A. 2d 753 (1970); *Commonwealth v. Bennett*, 439 Pa. 34, 264 A. 2d 706 (1970); *Commonwealth v. Ware*, 438 Pa. 517, 265 A. 2d 464 (1969), cert. denied, 397 U. S. 925, 90 S. Ct. 918 (1970); *Commonwealth v. Williams*, 432 Pa. 557, 248 A. 2d 301 (1968); *Commonwealth v. Leaming*, 432 Pa. 326, 247 A. 2d 590 (1968); *Commonwealth v. Robinson*, 428 Pa. 458, 239 A. 2d 308 (1968); *Commonwealth v. Sites*, 427 Pa. 486, 235 A. 2d 387 (1967), but we adopt the *Johnson* position as a matter of state law. (Footnote omitted; emphasis supplied.)

(*Id.* at 55-56), respondent argues that there is an adequate and independent ground upon which the Pennsylvania Supreme Court based its decision. The Commonwealth respectfully submits that neither this language nor the later statement of the Court that "we are in agreement with the rationale of *Johnson*, and we affirm it as a matter of state law" (*id.* at 58) can be taken as the basis of the decision below since the Court demonstrated that it took this position only because it felt compelled to do so by this Court's decision in *Johnson*, *supra*. The Court was quite explicit in this connection:

> The Commonwealth would have us abandon the foregoing state and federal case law on the ground that the trial date language in *Johnson* was merely "ill-considered" and "inadvertent" dicta. We are unpersuaded.
>
> In the first place, *a state court is not free to ignore the dictates of the United States Supreme Court on federal constitutional matters* because of its own con-

clusion that those dictates are "ill-considered." Even if this or any other court should disagree with the views of the United States Supreme Court on a particular constitutional issue, *those views are binding*. See, e.g. *Commonwealth v. Williams*, 432 Pa. 557, 568 n. 8, 248 A. 2d 301, 307 n. 8 (1968).

In the second place, *we do not believe that the Supreme Court was speaking "inadvertently" when it stated five separate times in Johnson that Miranda should apply to all post-Miranda trials.* Any possible doubts in this regard should have been forever put to rest by the Supreme Court's subsequent decision in *Jenkins v. Delaware*, 395 U. S. 213, 89 S. Ct. 1677 (1969), which further clarified and explicitly reaffirmed the principles of *Johnson:* "[W]e could have . . . made the point of initial reliance, the moment the defendant is interrogated, the operative event. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial." *Id.* at 219, 89 S. Ct. at 1680-81.

Finally, we must reject the Commonwealth's claim that *Johnson* has been overruled *sub silentio* by the Supreme Court's more recent retroactivity cases fixing the date of the alleged constitutional violation rather than the date of trial as the operative cut-off date. There are of course "occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court of a conclusion inconsistent with an older Supreme Court case." *Rowe v. Peyton*, 383 F. 2d 709, 714 (4th Cir. 1967). But this is certainly not such a situation. *Johnson's* trial date rule has been reaffirmed by

> the Supreme Court as recently as April 5, 1971. See *Mackey v. United States*, 401 U. S. 667, 714, 91 S. Ct. 1160, 1164 (1971); *Williams v. United States*, 401 U. S. 646, 665 n. 7, 91 S. Ct. 1148, 1153 n. 7 (1971). Therefore, we are without constitutional authority to adopt a test for the retroactivity of *Miranda* which is inconsistent with *Johnson*. (Footnotes omitted; emphasis supplied.)

Id. at 56-58.

The Commonwealth in its brief before the Pennsylvania Supreme Court had argued that the *Johnson* "trial-date" rule was not constitutionally required. The Pennsylvania Supreme Court rejected this argument. The fact that the Court did so is a further indication that it felt bound by this Court's decision in *Johnson*.

Perhaps the clearest evidence that the Pennsylvania Supreme Court did not willingly adopt the *Johnson* test for setting a retroactivity date in the *Miranda* context is the fact that each and every member of that Court who had previously been faced with this issue had expressed extreme dissatisfaction with the "trial-date" rule:

> (1) Justice Roberts: *Commonwealth v. Schmidt*, 423 Pa. 432, 445 (1966) ("Since the essential rationale of [*Miranda*] seems to be deterrence of improper police practices I can see no sensible reason for making the trial date the determinative one. See *Linkletter v. Walker*, at 637, 85 S. Ct. at 1742. In my view the crucial date ought to be the date the confession was elicited and I would judge its admissibility according to the standards judicially announced at that time."); *Commonwealth v. Willman*, 434 Pa. 489, 491-92 (1969) ("It is not altogether clear * * * why *Johnson* utilized a date-of-trial test, rather than the date-of-occurrence test used subsequently in *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). It does seem, however, that the Court has wisely chosen in *Jenkins* to restrict to as great an extent as possible, within the limits of *Johnson*, the anomalous situation where the police are re-

quired to have given *Miranda* warnings before *Miranda* had been decided."); *Commonwealth v. Yount*, 435 Pa. 276, 279 (1969) ("The case before us illustrates the difficulty for the Commonwealth which *Johnson* can cause. Although appellant appears to have received almost all the warnings required by *Miranda*, he was not told that he was entitled to free counsel if he could not afford his own attorney. * * * Thus the Commonwealth failed to give all the warnings necessitated by *Miranda*, and this it was required to do even though *Miranda* had not yet been decided.")

(2) Justice O'Brien: *Commonwealth v. Willman*, *supra*, 434 Pa. at 495-96 ("... I would not have chosen the date-of-trial test utilized in *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966), but would have selected the date-of-occurrence test of *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). * * * If the Court made a mistake in *Johnson*, as I believe it did, it should have said so, rather than seizing upon a distinction without a difference.")

(3) Justice Jones: *Commonwealth v. Yount*, *supra*, 435 Pa. at 281-82 ("With the utmost reluctance, I concur in the result reached by the majority of this Court. ... Under the compulsion of *Miranda* and only by reason thereof, I concur in the majority's result."); also *Commonwealth v. Willman*, *supra*.

(4) Justice Eagen: *Commonwealth v. Robinson*, 428 Pa. 458, 460 n. 1 (1968) ("Ironically, the crime involved occurred on September 3, 1965, and if Robinson's trial had commenced prior to June 13, 1966, the date of the *Miranda* decision, the evidentiary use of the confession would not be constitutionally proscribed since all of the warnings of the constitutional rights required by *Escobedo v. Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964), were given."); also *Commonwealth v. Yount*, *supra*.[1]

---

[1] Other than the above four Justices, only one other member of the Court, Mr. Justice Barbieri, took part in consideration of this case. Justice Barbieri, a recent member of the Court, had never previously

Thus, respondent's suggestion that the Pennsylvania Supreme Court willingly adopted the "rationale" of *Johnson*[2] when it said, "We need not, however, respond to the Commonwealth's views as to what 'should be': to put it quite simply the matter is no longer an open question" (*id.* at 55) is not well taken. The Court decided the case in the first paragraph of its opinion and did so only on the basis of what it believed to be the "controlling and unambiguous pronouncements of the United States Supreme Court concerning the extent of *Miranda's* retroactivity." *Id.* at 53. Furthermore, when the Pennsylvania Supreme Court's opinion is read as a whole it is clear that the "adoption" of *Johnson* as a matter of state law was done under what that Court deemed the compulsion of the United States Constitution.

In any event, even if the Pennsylvania Supreme Court's decision were ambiguous in this respect, the present case is one where any supposed state ground, far from being independent, is so interwoven with the federal constitutional ground that this Court is entitled to retain jurisdiction in this case. In *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939), state and federal grounds were used "alternatively" as a basis for the state court's decision, the state court's opinion referring not "only incidentally" to decisions of the United States Supreme Court. *Id.* at 514. This Court held that in such a case the "two grounds are so interwoven" that it could not find an independent state ground for the decision. *Id.* See also *Standard Oil of California v. Johnson*, 316 U. S. 481, 483 (1942) ("If the court's construction of [the state statute] had been based purely on local

---

expressed an opinion on this issue. Then Chief Justice Bell and Justice Pomeroy did not participate in the consideration or decision of the case.

[2] The Pennsylvania Supreme Court did not even purport to suggest a "rationale" for the **Johnson** "trial-date" rule, the Court relying instead on what it deemed the controlling reaffirmation of **Johnson** in **Jenkins v. Delaware**, 395 U. S. 213 (1969).

law, this construction would have been conclusive. . . . But . . . the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning [an issue] which is controlled by federal law. . . . Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct"); *Patterson v. Alabama*, 294 U. S. 600 (1925) (despite the existence of a technically adequate and independent state ground for decision, this Court vacated the judgment and remanded the case to the state court where this Court was "not satisfied that the [state] court would have dealt with the case in the same way if it had determined the constitutional question as we have determined it"); and *Perkins v. Benguet Mining Co.*, 342 U. S. 437, 443 (1952) ("for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so."). Also cf. Wright, *Law of Federal Courts* (2d ed. 1970), p. 489 ("A new state rule cannot be invented for the occasion in order to defeat the federal claim"); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 456-58 (1958).

Finally, in the court below the Commonwealth contended that the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §3501(b), had overruled the *Miranda* decision to the extent that *Miranda* was interpreted as mandating the inadmissibility of confessions obtained without the giving of detailed warnings where the confessions were voluntary within the meaning of the Act.[3] The Com-

[3] This issue was raised by both parties in the Court below (see Appendices A and B attached hereto). This was the only other issue raised aside from the retroactivity cutoff date question, there being no challenge to the voluntariness of the confessions. Nor did a majority of the Pennsylvania Supreme Court even discuss the issue of whether the interlocutory order initially entered which was later withdrawn after the nol pros was removed barred the use of defendant's confessions. The Commonwealth's basic position in the trial court was that what had happened, in essence, was that: (1) the court initially granted the motion to suppress solely on the ground that **Johnson**

monwealth's brief in the Pennsylvania Supreme Court on this issue is set forth as Appendix B hereto.

Since *Miranda* has never been adopted as a matter of state law in Pennsylvania, this second issue, which has been raised and preserved in all the lower courts and was necessarily rejected by implication by the Pennsylvania Supreme Court, is clearly another federal constitutional question involved in this case which is now ripe for decision by this Court. There is also no adequate and independent state ground on this second issue. Indeed, respondent does not even suggest the contrary.

---

controlled; (2) a nolle prosequi was entered **with defendant's consent:** and (3) later cases had the same effect as if **Johnson** had been explicitly overruled such that the Commonwealth now was entitled to move to trial and use the confessions. This position prevailed in the lower courts (see Appendices A and B of the "Petition") and was not even challenged by respondent on his appeal to the Pennsylvania Supreme Court. Though one Justice of the Court raised the nol pros issue, the majority opinion dealt directly with the federal constitutional issue.

CONCLUSION.

Wherefore, the Commonwealth respectfully requests that this Court continue to sustain its granting of the Writ of Certiorari.

Respectfully submitted,

JAMES T. RANNEY,
Assistant District Attorney,
MILTON M. STEIN,
Assistant District Attorney,
Chief, Appeals Division,
JAMES D. CRAWFORD,
Deputy District Attorney for Law,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

APPENDIX "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District.

No. 247, January Term, 1971.

COMMONWEALTH OF PENNSYLVANIA
v.
PAUL D. WARE, *Appellant.*

BRIEF FOR APPELLANT.
(In Forma Pauperis)
and
OPINION OF COURT BELOW.

Appeal From the Order of the Court of Common Pleas of Philadelphia County Trial Division, Criminal Section, at Nos. 328, 343, 345, 349, of December Term, 1963.

J. CHARLES SHORT,
1440 PNB Bldg.,
Phila., Penna. 19107,
Attorney for Appellant.

[Index to Brief deleted.]

STATEMENT OF JURISDICTION.

This appeal arises on a Special Writ Of Certiorari to the Court of Common Pleas Trial Division, Criminal Section, for the County of Philadelphia, Pennsylvania. On December 2, 1970 defendant filed a Petition with your Honorable Court under Section 501(b) of the Pennsylvania Appellate Court Jurisdiction Act of 1970, P. L. ——, No. 223, 17 P. S. §211.501(b), for leave to file an appeal from an Interlocutory Order of the Court below, dismissing an Application to Suppress Pre-*Miranda* confessions.

On January 6, 1971, the following Order was entered by Your Honorable Court:

"January 6, 1971.
Petition granted.
s/ Roberts and Pomeroy, JJ."

Thereafter, on April 7, 1971 a Per Curiam Order issued permitting Appellant to proceed In Forma Pauperis.

STATEMENT OF QUESTION INVOLVED.

1. Where confessions were made before the *Miranda* decision is their admissibility to be determined under *Miranda* rules where trial will commence substantially beyond the effective date of the *Miranda* decision due to defendant's intervening mental incapacity?

(Answered in the negative in the Court below.)

HISTORY OF THE CASE.

Paul D. Ware, defendant, by special allowance of your Honorable Court, appeals the November 13, 1970, Order by Honorable Robert N. C. Nix, Jr., of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, denying defendant's Application To Suppress statements obtained from him allegedly in violation of the rules in *Miranda v. State of Arizona*, 384 U. S. 436, S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Following his arrest on September 27, 1963, in connection with a burglary, defendant on October 3, 1963, in the course of custodial interrogation, gave oral and written statements implicating himself in four separate murders. He was indicted on four homicide charges by the December, 1963 Grand Jury. However, on December 12, 1963 defendant was declared incompetent to stand trial and was committed to Farview State Hospital where he remained from January 6, 1964 until July 19, 1967.

Court appointed counsel for defendant in October, 1967, moved to suppress the statements made on October 3, 1963, on the ground that they were obtained in violation of the *Miranda* rules. On May 23, 1968 the Honorable Robert N. C. Nix, Jr., pursuant to the agreement of counsel that the statements were elicited in violation of *Miranda* standards, entered an Order of Suppression.

Thereafter, on December 12, 1968, at the request of the Commonwealth, the Honorable D. Donald Jamieson entered a nolle prosequi of the four murder bills in question for the reason that, without defendant's statements, the Commonwealth could not prove its case. Defendant offered no objection.

Approximately eight months later, on August 11, 1969, the District Attorney petitioned for the removal of the nolle prosequi on the bills of indictment, contending in essence that the law was now such that the defendant's confessions should not be suppressed. On December 11, 1969, the Hon.

D. Donald Jamieson granted the Commonwealth's Motion to remove the nolle prosequi previously entered on the four homicide bills of indictment.

Thereafter, on June 19, 1970 Judge Nix vacated the Order of Court entered May 23, 1968 and ordered a Suppression Hearing. On November 13, 1970 the Court made an order directing that defendant's Application to Suppress his written and oral statements be denied. In the Opinion accompanying said Order the learned trial Judge holds that *Miranda* is not applicable to the instant case, but does not discuss prior decisions of your Honorable Court holding that *Miranda* does apply to cases brought to trial after June 13, 1966. The Opinion expresses concern for the complete frustration of law enforcement officials who elicit incriminating statements relying on the law then existent.

On the joint petition of defense and Commonwealth counsel, on December 1, 1970 the Court supplemented and amended its Order of November 13, 1970 by adding thereto that in the opinion of the Court such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

SUMMARY OF ARGUMENT.

Appellant contends with respect to the pre-*Miranda* confessions involved, that the learned Trial Judge disregarded clear and authoritative pronouncements by your Honorable Court, based upon *Johnson v. New Jersey*, fixing the date-of-trial test as the rule for cases coming to trial after June 13, 1966. *Jenkins v. Delaware* and *Commonwealth v. Willman* reaffirm that rule and do not open the door for carving out exceptions in cases of delay in coming to trial.

Both the United States Supreme Court and your Honorable Court have recognized that the date-of-

trial test could produce some resultant inequities. The Commonwealth originally accepted the *Miranda* test in this case, then did an about face, asserting that there is now a basis for restricting the application of *Miranda* where the Commonwealth is not to blame for delay in bringing a mentally incompetent defendant to trial. One of the Commonwealth's points in its petition to remove the nolle prosequi was the adoption of the federal Omnibus Crime Control and Safe Streets Act which has been held not applicable to our state courts.

The decisional law does not support the reasoning of the learned Trial Judge that there are no controlling or compelling appellate decisions on point and that the suppression of confession issue in this case should be decided by reference to the "general philosophy" of the United States Supreme Court.

Appellant contends further that the learned Trial Judge incorrectly made voluntariness the primary test instead of applying the failure to give *Miranda* warnings to the defendant as the test clearly required by the decisions of your Honorable Court, both on the law and the facts of the case.

On the whole the learned Trial Judge resorted to a strained interpretation and application which simply cannot be reconciled with the clear rulings of your Honorable Court.

ARGUMENT.

1.

Introduction.

The effect of the lower Court's decision, if allowed to stand, will be to open the door for exceptions to the already clearly announced rule of Your Honorable Court, that *Miranda* warnings are required in all cases brought to

initial trial after June 13, 1966. In the teeth of such rule the learned trial Judge finds an exception which he considers supported by reference to the "general philosophy" of the United States Supreme Court. At page 25 of his Opinion, the learned Trial Judge states that "We feel compelled from the logic of *Johnson* and *Jenkins* to conclude that the philosophy of those decisions is incompatible with the result urged here by the defense".

The lower Court's opinion makes no reference to the decisions of your own Honorable Court on the precise point that where a defendant's trial takes place after *Miranda* the admissibility of his confession is to be determined under *Miranda* rules. Basically, the instant case boils down to a consideration of what the well established law is, rather than what the trial judge would like it to be. This argument will show that the Honorable Judge Nix failed to follow well established Pennsylvania cases and also incorrectly distinguished the decisions of the United States Supreme Court. Both Courts were well aware of certain inconveniences for prosecutors when they balanced the constitutional safeguards involved and adopted the date-of-trial test.

2.

Miranda Rules Apply To Cases Coming To Trial After June 13, 1966.

It has always been clear under *Johnson v. New Jersey*, 384 U. S. 719 (1966), and the decisions of the Pennsylvania Supreme Court, that *Miranda* rules apply to *pre-Miranda* confessions in cases where the trial begins after June 13, 1966, the date of the decision in *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). Clear pronouncements by your Honorable Court leave no room for doubt on this score.

A.

Miranda Warnings Are Required Even Though Miranda Had Not Yet Been Decided.

Commonwealth v. Yount, 435 Pa. 276 (1969).
Commonwealth v. Marvin Ware, 438 Pa. 517 (1970).
Commonwealth v. Davis, 440 Pa. 123 (1970).

In *Commonwealth v. Yount, supra*, the confessions were given on April 29, 1966. Before trial, defendant moved to suppress the confessions as violative of *Miranda v. Arizona, supra*. The motion was denied and trial commenced September 28, 1966, with the confessions being admitted over defendant's objection. Your Honorable Court reversed with a Concurring Opinion by Mr. Justice Jones and a Dissenting Opinion by Mr. Chief Justice Bell. The Opinion for the majority by Mr. Justice Roberts states at page 279:

> "Although appellant's confessions came before the decision in *Miranda*, since appellant's trial took place after *Miranda*, the admissibility of the confessions is determined under the *Miranda* rules. *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966). The case before us illustrates the difficulty for the Commonwealth which *Johnson* can cause. Although appellant appears to have received almost all the warnings required by *Miranda*, he was not told that he was entitled to free counsel if he could not afford his own attorney. See e.g., *Commonwealth v. Dixon and Kontos*, 432 Pa. 423, 248 A. 2nd 231 (1968). Thus the Commonwealth failed to give all the warnings necessitated by *Miranda*, and this it was required to do even though *Miranda* had not yet been decided."

In *Commonwealth v. Marvin Ware, supra,* the confession was given in January, 1966. The case came to trial after June 13, 1966. The Opinion by Mr. Justice Roberts, at page 519, states that: "The admissibility of the instant confessions is controlled by *Miranda v. Arizona.*" Mr. Chief Justice Bell and Mr. Justice Jones dissented.

In *Commonwealth v. Davis, supra,* which was tried before the Honorable Judge Robert N. C. Nix, Jr., the defendant while in police custody made an incriminating statement on April 4, 1966. A Per Curiam Opinion, dated October 9, 1970, states at page 125: "The trial occurred subsequent to the effective date of *Miranda v. Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966), and hence, unless Davis was fully informed of his constitutional rights before the questioning commenced as *Miranda* requires, evidentiary use of the statement violated due process. *Johnson v. New Jersey,* 384 U. S. 719, 86 S. Ct. 1772 (1966). Judgment was reversed and a new trial ordered. Mr. Chief Justice Bell and Mr. Justice Jones dissented.

B.

The Rule That the Commencement of Trial is Determinative is Reaffirmed by Jenkins v. Delaware.

Jenkins v. Delaware, 395 U. S. 213 (1969).

The question of whether *Johnson v. New Jersey, supra,* applied to the post-*Miranda retrial* of a *pre-Miranda* defendant was laid to rest in *Jenkins v. Delaware, supra.* Actually the case deals with the time of "commencement" of a trial which occurred before the *Miranda* ruling. It is difficult to see how this decision on *retrials* can aid the Commonwealth in the instant Paul Ware case. Although the Opinion by Mr. Chief Justice Warren, speaking for the majority, recognized the difficulties facing a prosecutor

where an investigation was closed years prior to retrial, the ruling reaffirmed *Miranda*, supra, and *Johnson v. New Jersey*, supra. The Opinion by Mr. Chief Justice Warren at page 219 states:

> "In *Johnson;* after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitutional standards then applicable. See *Linkletter v. Walker,* 381 U. S. 618 (1965). As we pointed out, however, that choice 'would (have) impose(d) an unjustifiable burden on the administration of justice.' 384 U. S., at 733. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See *Schaefer, supra,* at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. . . ."

Although the United States Supreme Court could have adopted some other test, the fact remains that it did adopt the date-of-trial test. In *Commonwealth v. Willman,* 434 Pa. 489 (1969), an appellant contended that although his first trial took place before *Miranda*, his re-trial took place after *Miranda* and thus in the second trial, the *Miranda* rules apply. The majority Opinion by Mr. Justice Roberts states at pages 491, 492:

> "Appellant's contention has recently been rejected by the Supreme Court of the United States as a result compelled by the Constitution of the United States as interpreted in *Johnson v. New Jersey,* 384 U. S. 719, 86 S. Ct. 1772 (1966), the case which delineated the

extent to which *Miranda* would apply. See *Jenkins v. Delaware*, 395 U. S. 213, 37 L. W. 4458 (1969). Although both *Johnson* and *Jenkins* permit us, as a matter of state law, to apply *Miranda* more broadly than would the Supreme Court of the United States we choose not to do so.

The opinion in *Jenkins* indicates that the Court in *Johnson* was attempting to strike a balance between the need for even-handed administration of justice and administrative burden placed on the law enforcement system by retroactive application. It is not altogether clear, even in light of this, why *Johnson* utilized a date-of-trial test, rather than the date-of-occurrence test used subsequently in *Stovall v. Denno*, 388 U. S. 293, 87 S. Ct. 1967 (1967). It does seem, however, that the Court has wisely chosen in *Jenkins* to restrict to as great an extent as possible, *within the limits of Johnson*, the anomalous situation where the police are required to have given *Miranda* warnings before *Miranda* had been decided. Since the requirements of *Miranda* do not go to the validity of the guilt-determining process, it seems fair in striking the balance between individual rights and the administration of criminal justice to limit the retroactive application of the case. See generally Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965). This is especially true since the voluntariness test, considering the absence of *Miranda* warnings as a relevant factor, still provides a mechanism to guard against the infringement of individual liberties. See Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 326-27 (1967)." (Emphasis added.)

In a Concurring and Dissenting Opinion Mr. Justice O'Brien states, at page 495, that as a matter of state law he would not have chosen the date-of-trial test utilized in

Johnson v. New Jersey, but would have selected the date-of-occurrence test of *Stovall v. Denno.* At page 496 Mr. Justice O'Brien says that *Miranda* "sets forth the law of the land, and we must follow it, but we are not required to sing its praises".

The United States Supreme Court recognized that there might be some resultant inequities in the application of the test which it had formulated. In Jenkins, it was further said at pages 217, 218:

> "In short, petitioner's concern for what he refers to as 'visible imperfection (s) in a judicial process' merely highlights the problem inherent in prospective decision-making, i.e., some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the specter of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of newly formulated constitutional principle."

C.

Difficulty in Obtaining Evidentiary Substitutes Should Not Be a Controlling Factor in This Case.

The Commonwealth was aware of the difficulty confronting it with respect to obtaining evidentiary substitutes when it agreed to the Suppression Order of May 23, 1968. On August 12, 1969 the Commonwealth petitioned to reopen the suppression because it believed, in large measure, that the federal Omnibus Crime Control and Safe Streets Act effective June 19, 1968, had, in effect, overruled

Miranda. And the Commonwealth's Petition to Reopen alleged that as a matter of federal constitutional law, there cannot be more restrictive standards on states, based on the requirements of the United States Constitution, than those applicable to federal law enforcement officers and trial in federal courts (Paragraphs 10-14).

In *Commonwealth v. Bennett*, 439 Pa. 34 (1970), your Honorable Court rejected a Commonwealth contention in that case that the *Omnibus Act, supra*, should be applied in determining the admissibility of defendant Bennett's admissions and confession. However, the trial in that case had been concluded before the said federal enactment became effective.

In *Commonwealth v. Marvin Ware*, 438 Pa. 517, decided May 27, 1970, your Honorable Court held that the said *Omnibus Act* is not applicable in State courts.

In his Opinion of June 19, 1970 accompanying the Order vacating the Suppression Order of May 23, 1968 and directing a Suppression Hearing, his Honor, Judge Nix stated that the Commonwealth's contention that the *Miranda* decision had been significantly modified by the *Omnibus Crime Control and Safe Street Act*, P. L. 90-351. Title II, 82 Stat. 210, 18 U. S. C. Sec. 3501 had been rejected by the Pennsylvania Supreme Court in *Commonwealth v. Bennett, supra*. However, the Court went on to recognize as a "contention with substance justifying the exercise of discretion to permit the Commonwealth to elicit additional testimony", the Commonwealth's contention that where statements were elicited prior to the *Miranda* decision, supra, and trial was delayed by virtue of the incapacity of the defendant until after June 13, 1966, the defendant should not derive the benefit from this delay" (page 5).

The subsequent opinion of November 13, 1970 strains and labors to reach a result favorable to the Commonwealth's contention. In stating the questions involved, the lower Court directs itself first to whether the incriminatory statements made by defendant during custodial interroga-

tion were voluntary, and only secondly, considers whether the statements must be suppressed because of the failure to give the *Miranda* warnings (page 2). However, in his discussion the learned trial Judge concedes that "at no time was Ware effectively warned of his constitutional rights" (page 15) and that "Miranda warnings were not given during the various interrogations which occurred nearly three years prior to that landmark decision". (page 16). The Court then went on to state that "Having determined the statements of this defendant during custodial interrogation to have been voluntary it is now incumbent upon us to determine the applicability of *Miranda v. Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (page 18).

Without referring to the decisions of Your Honorable Court applying the *Miranda* rules to cases coming to trial after June 13, 1966, Judge Nix reasoned that neither *Jenkins* nor *Johnson* passed upon the applicability of *Miranda* to trials where delay has resulted in removing the possibility of obtaining substitute evidence and its application would completely frustrate the attempt to prosecute the felon (page 23).

The trial judge reasoned that the United States Supreme Court had not weighed all of the distortions that might result from the selection of the trial as the operative date (page 23). He then went on to state that "There being no U. S. Supreme Court pronouncement on the subject and from our investigation no other controlling or compelling appellate decisions on point, we must now decide the cause attempting to find direction from the general philosophy the Supreme Court has provided in this area" (page 24).

We respectfully submit that the learned lower Court has not applied the case law, particularly the decisions of your Honorable Court, as it is, but as the trial judge and probably many others would like to see it be. However, if a trial judge can carve out this exception he can carve out another exception in another case and the established rule that the date-of-trial governs the application of *Miranda*

tests will have lost all significance. There will cease to be an ascertainable rule.

3.

Miranda Rules Require Minimum Basic Constitutional Safeguards.

In *Commonwealth v. Yount, supra,* the majority opinion states, at pages 279, 280:

> "The Commonwealth attempts to get out of the corner into which it apparently has been painted by arguing that appellant's confession was 'voluntary'. But although appellant's confession was certainly voluntary in the *Davis v. North Carolina,* 384 U. S. 737, 86 S. Ct. 1761 (1966) sense, it was not *volunteered* as required by *Miranda*".

A warning that a statement could be used for the defendant at trial was held to be an impermissible inducement in *Commonwealth v. Singleton,* 439 Pa. 185 (1970).

In *Commonwealth v. Bennett, supra,* your Honorable Court ruled "that, under the circumstances, it was absolutely essential before the questioning began during the polygraph test, that Bennett be given a full warning of his constitutional rights . . ." (page 38).

The proper course for the learned Trial Judge to have followed in the instant Paul Ware case would have been first to determine whether *Miranda* applied or not. Then if he ruled that *Miranda* did not apply he could have proceeded to evaluate appellant's confessions under the post-Miranda voluntariness test: Cf. *Commonwealth v. Willman, supra.*

4.

Conclusion.

It is respectfully submitted that the Order of the lower court denying defendant's Application to Suppress statements and confessions obtained from him during the course of custodial interrogation cannot be reconciled with the clear pronouncements of your Honorable Court. The lower court's order should be reversed and the *Miranda* rules held applicable to this case which has not yet come to trial.

Respectfully submitted,

J. CHARLES SHORT,
(Appointed) Attorney for Appellant,
Paul D. Ware.

DOCKET ENTRIES.

IN THE COURT OF COMMON PLEAS
TRIAL DIVISION—CRIMINAL SECTION
COUNTY OF PHILADELPHIA.

COMMONWEALTH	December 1963.
VS.	328—MURDER.
PAUL WARE.	343—MURDER.
	345—MURDER.
	349—MURDER.

Oct. 11, 1963 Order—Neuro-Psychiatric Examination requested by District Attorney. Order Granted. Sporkin, J.

April 16, 1968 Petition to Suppress Filed.

May 23, 1968 Petition to Suppress Granted. Nix, J.

Dec. 12, 1968 Court Room 253. Presiding Hon. Donald Jamieson. A Nolle Prosequi is entered as to all Bills. Jamieson, J.

Aug. 12, 1969 Commonwealth Petition to remove Nolle Prosequi and reopen hearing on Motion to Suppress Filed.

Dec. 11, 1969 Commonwealth's Motion to remove Nolle Prosequi on all Bills is hereby granted. Jamieson, J.

June 19, 1970 Order: The Order of the Court entered on 5/23/68 is hereby vacated. It is further ordered that a Suppression Hearing be held June 25, 1970. Leave is granted to Defendant to Amend their Petition. Opinion Filed. Nix, J.

Nov. 13, 1970 Order—It is Ordered and Decreed that the Defendant's Motion to Suppress Written and Oral Statements is Denied. Opinion Filed. Nix, J.

Dec. 2, 1970 Joint Petition for Suppression Order Filed, Eo Die: Supplemental Order. Upon the Joint Petition of the Defendant and District Attorney it is Ordered and Decreed that the Order filed on 11/13/70 Be and the same is hereby Supplemented and Amended by adding thereto that: in the Opinion of the Court, such Order involves a controlling question of Law, as to which there is substantial ground for difference of opinion and that an immediate Appeal from the Order may advance the ultimate termination of this matter. Nix, J.

June 14, 1970 Certiorari from the Supreme Court filed, Returnable the 3rd Monday of April, 1971.

[The Opinion of the trial court has been deleted from this Appendix.]

APPENDIX B.*

AS A RESULT OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, DEFENDANT'S CLEARLY VOLUNTARY CONFESSION IS PROPERLY ADMISSIBLE AT HIS TRIAL.

The Supreme Court of the United States in *Miranda v. Arizona,* 384 U. S. 436 (1966), ruled that no confession could be introduced into evidence at any trial unless detailed warnings were given and waivers obtained in accordance with that decision.

The Omnibus Crime Control and Safe Streets Act, passed by the Congress, signed by the President, and effective on June 19, 1968, revised the standards for the admissibility of confessions in Federal Courts, so that a confession can be introduced into evidence if it is voluntarily given considering all the surrounding facts. P. L. 90-351, Title II, 82 Stat. 210, 18 U. S. C. §3501:

> ADMISSIBILITY OF CONFESSION.
>
> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

---

* The following argument is that made by the petitioner in their brief in the Court below.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

This law in effect overrules *Miranda* in permitting the introduction into evidence of clearly voluntary statements made by an accused during custodial interrogation without the detailed warnings and waivers. It is in basic harmony with the Fifth Amendment, which states that: "nor shall [any] [person] be compelled in any criminal case to be a witness against himself."

This Court has refused to apply the 1968 Congressional legislation because it "relates only to a 'criminal prosecution brought by the United States or by the District of Columbia' ". Moreover, the trial in the instant case was concluded before the enactment became effective." *Commonwealth v. Bennett*, 439 Pa. 34, 39 (1970). But the case now before this Court has not yet been tried. And though the 1968 Congressional enactment by its terms applies to federal, not state, prosecutions, the fact is that the legisla-

tion expresses the clear idea that *Miranda*, in terms of the explicit requirements there set forth, is not Constitutionally binding.

The *Miranda* opinion itself stated: ". . . [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted". [384 U. S. at 467.] It has also now become clear that the particular solution suggested in *Miranda* has not won national acceptance (see footnote 10, supra).

Title II of the Omnibus Crime Control and Safe Streets Act constitutes a statement of national public policy that confessions should be admissible into evidence without the detailed *Miranda* warnings and waivers. As a matter of federal constitutional law, there cannot be more restrictive standards on states, based on the requirements of the United States Constitution, than those applicable to federal law enforcement officers and to trial in federal courts. See *Bolling v. Sharpe*, 347 U. S. 497 (1954).

The Omnibus Crime Control and Safe Streets Act was passed after extensive congressional hearings which contained testimony, statistics, and other data showing the unduly restrictive effects on law enforcement officers resulting from the *Miranda* decision:

> Statistical evidence further indicates the harmful effects of the *Miranda* decision. During the subcommittee hearings, Arlen Specter, district attorney of the City of Philadelphia, revealed a study on the effects of *Miranda* conducted by his office. The results indicated that prior to the *Escobedo* case, 90 percent of the suspects would make a statement, often not incriminating on their face, but valuable in investigating the crime. After *Escobedo*, only 80 percent would give statements. After the second circuit *Russo* case, only 68 percent of suspects would give statements. Then came the *Miranda* case in June 1966. For a period after *Miranda*, out of 5,220 suspects arrested for serious crimes, 3,095 refused to give a statement. This is a

percentage of only 41 percent who would give statements; a decrease of 49 percent since *Escobedo*. These statistics are inclined to become more alarming as more criminals become more familiar with *Miranda*.

Aaron Koota, district attorney for Kings County, N. Y., conducted a similar survey, indicating that prior to *Miranda*, approximately 10 percent of the suspects involved in serious crimes refused to make statements or confessions to police. After *Miranda*, 41 percent refused to make statements or confessions. Specifically, between June and September of 1966, Mr. Koota revealed that 130 of 316 suspects refused to make any statement at all. In only 30 of these 130 cases did Mr. Koota have sufficient evidence to prosecute apart from the confession. Mr. Koota was unequivocal in stating that confessions are helpful in securing convictions.

Charles E. Moylan, Jr., State's attorney for the city of Baltimore, Md., reports more disturbing statistics. Mr. Moylan said:

> * * * [W]e used to get * * * (confessions) in 20 to 25 percent of our cases, and now we are getting * * * (them) in 2 per cent of our cases. The confession as a law-enforcement instrument has been virtually eliminated (hearings, p. 622).

Mr. Moylan noted that the *Miranda* case has encouraged criminals, discouraged the police, and disappointed the public that depends on the courts for protection.

Frank S. Hogan, New York County district attorney, reported similar findings. In the 6 months prior to the *Miranda* case, 49 percent of the nonhomicide felony defendants in New York County made incriminating statements. In the 6 months after the decision, only 15 percent of the defendants gave incriminating statements. Mr. Hogan characterized it as being most harmful to efforts to convict criminals who roam our streets and assault our citizens.

Committee Report, P. L. 90-351, Title II, 1968 U. S. Code and Adm. News, pp. 212-29. Congress concluded that continued adherence to the rigid requirements of the *Miranda* decision is unwise as a matter of policy, and not required by the United States Constitution (Id. at pp. 2132-38):

> The committee is convinced from the mass of evidence heard by the subcommittee, much of which is printed in the transcript of hearings, that the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement. Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt. The transcript and subcommittee files contain testimony and statements from district attorneys, police chiefs, and other law enforcement officers in cities and towns all over the country, demonstrating beyond doubt the devastating effect upon the rights of society of the *Miranda* decision. The unsoundness of the majority opinion was forcefully shown by the four dissenting justices, who also predicted the dire consequences of overruling what theretofore had been the law of the land, confirmed in 1896 in *Wilson v. U. S.*, 16 S. Ct. 895, 162 U. S. 613, and in 1912 in *Powers v. U. S.*, 32 S. Ct. 281, 223 U. S. 303, and in other more recent Supreme Court decisions.
>
> The Supreme Court itself suggests that Congress is free to enact legislation in this field. The Court's invitation for Congress to act could stem from a widespread notion that Congress is better able to cope with the problem of confessions than is the Court. Senator Bible, in testifying before the subcommittee, observed that experience has taught that Court decisions are too inexact to deal with postarrest problems. The Honorable J. Edward Lumbard, Chief Judge of the U. S. Court of Appeals for the Second Circuit agrees. He states:

In my opinion, it is most important that the Congress should take some action in the important areas I have discussed. The legislative process permits a wide variety of views to be screened and testimony can be taken from those who know the facts and those who bear the responsibility for law enforcement.

The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.

Judges seldom have before them all those who are the best informed regarding practical problems and the difficulties in living with any proposed change in the law. Judges usually are advised only by the parties in the case; the parties want to win the case and do not always care about general principles of wider application.

As I said before, it is because the Congress and the legislatures of the States have taken so little action in the field of criminal justice that the courts have more and more chosen to lay down rules which have the force of law until changed, and which all too frequently come to us in the form of new constitutional principles which then can be modified only by constitutional amendment (hearings, p. 184).

Mr. Specter expresses a similar view. He pointed out that the subcommittee hearings make it possible for Congress to examine all the facets of human experience that must be taken into account in solving the problem of confessions. The courts, in considering only the limited facts and issues of each particular case do not have the opportunity to evaluate all these factors. Passage of this bill with all of its legislative history—

the record of the subcommittee hearings and all of the underlying social policies bearing on this issue and taken into account by Congress—will furnish an excellent record that will hopefully make an impression on some of the Supreme Court Justices. . . .

The committee is of the view that the legislation proposed in section 701 of title II would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. By the express provisions of the proposed legislation the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors. There is the added safeguard that the jury must be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted only after passing the tests of both court and jury under the above-described safeguards. The committee also feels that a civilized society could not be more fair to persons accused of crime, as the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation.

The committee is aware that a few have expressed the view that legislation by Congress restoring the voluntariness test to the admissibility of confessions and incriminating statements would be declared unconstitutional, on the ground that the provisions do not measure up to the rigid standards set forth in the majority opinion in *Miranda*. The committee, however, is aware also that the overwhelming weight of the testimony adduced by the subcommittee supported the passage of these provisions of the bill, and that the vast

majority of the witnesses expressed no doubt as to the constitutionality of the legislation. The committee is also aware that the opinions of the four dissenting Justices clearly indicate that neither of them would consider these provisions unconstitutional. Justice Harlan, it will be recalled, said the majority opinion "represents poor constitutional law," and that "it would be shared by few."

The committee feels that it is obvious from the opinion of Justice Harlan and other dissenting Justices (excerpts from which are heretofore quoted in this report) that the overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right. No one can predict with any assurance what the Supreme Court might at some future date decide if these provisions are enacted. The committee has concluded that this approach to the balancing of the rights of society and the rights of the individual served us well over the years, that it is constitutional and that Congress should adopt it. After all, the *Miranda* decision itself was by a bare majority of one, and with increasing frequency the Supreme Court has reversed itself. The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld.

After some delay in determining the constitutionality of the portions of the Omnibus Crime Control Act which limited the literal application of *Miranda,* Attorney General John N. Mitchell concluded that the new act was constitutional and that it should be used. Accordingly, a memorandum was sent to all of the United States attorneys throughout the country on June 11, 1969, and the full text released by the Attorney General (5 Cr. L. 2350-52 (footnotes in original):

DEPARTMENT OF JUSTICE
Washington, D. C. 20530
June 11, 1969

TO: UNITED STATES ATTORNEYS

SUBJECT: Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

The attached memorandum sets forth the Department's position in respect to implementing Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (concerning the admissibility of confessions and eye-witness testimony in federal criminal prosecutions). All cases presenting problems under *Miranda* or *Wade* should be examined in light of the arguments suggested by the memorandum. Those arguments, in brief, are as follows:

Section 3501—Under this section, the failure to give all aspects of the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession; Congress has reasonably directed that an inflexible exclusionary rule be applied only where the constitutional privilege against compelled self-incrimination itself has been violated, not where a particular protective safeguard has been violated without affecting the privilege itself.

Section 3502—Under this section, the positive testimony by a witness that he saw the accused commit the crime will suffice, for the purpose of admitting his identifying testimony at trial, to show that the basis of his ability to identify the accused is independent of any observation of a lineup at which the accused was not accorded the right to the presence of counsel.

In enacting Title II, Congress was, in effect, expressing its concern with the inflexible results of the *Miranda* and *Wade* decisions, and seeking to induce a judicial reexamination of the underlying bases for those holdings. The interpretation of Title II expressed in the attached memorandum attempts to avoid

a direct conflict between the legislation and the constitutional requirements of *Miranda* and *Wade*, and yet to achieve the benefit to law enforcement intended by Congress. The arguments outlined, if adopted by the courts, could salvage some cases which otherwise might be lost. As emphasized in the memorandum, however, the arguments presuppose the necessity of continuing to have federal agents give the *Miranda* warnings before interrogations, and afford an opportunity for the presence of counsel at lineups, as matters of standard practice.

WILL WILSON
Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington, D. C. 20530
Memorandum

SUBJECT: Title II of the Omnibus Crime Control and Safe Streets Act of 1968.

Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) contains provisions relating to the admissibility of confessions in federal criminal prosecutions which differ from the rules regarding such admissibility as announced by the Supreme Court in *Miranda v. Arizona*, 384 U. S. 436, and further contains a provision relating to the admissibility of eyewitness testimony which does not expressly set forth the limitations upon such admissibility as announced by the Court in *United States v. Wade*, 388 U. S. 218, and *Stovall v. Denno*, 388 U. S. 293. This memorandum sets forth the Department's position with respect to interpreting and relying upon provisions of Title II in cases tried subsequent to June 19, 1968, the effective date of the Act.

Section 3501 and Miranda

. . . The area where we believe the statute can be effective and where a legitimate constitutional argument can be made is the situation where a voluntary

confession is obtained after a less than perfect warning or a less than conclusive waiver, as, for example, where an agent inadvertently fails to fully explain the right to have counsel appointed for an indigent, or a written waiver is not obtained. The admissibility of the confession may be urged in an argument framed along the following lines:

In *Miranda v. Arizona*, 384 U. S. 439, the Supreme Court stated that confessions by persons accused of crime were "a proper element in law enforcement" and that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U. S. at 478. The Court found, however, that persons in police custody are, by virtue of that custody alone, subject to a form of "compulsion inherent in custodial surroundings." *Id.*, at 458; see *id.*, at 465, 467, 478. In order to dispel this inherent compulsion and thus to safeguard the individual's Fifth Amendment right "to remain silent unless he chooses to speak in the unfettered exercise of his own will" (*id.*, at 460), the Court held that accused persons must be made aware of their "right of silence" and assured a "continuous opportunity to exercise it." *Id.*, at 444; see *id.*, at 467, 479, 490.

The Court stated that it "cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process" (*id.*, at 467), as long as any solution devised is "effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" (*ibid.*). Various solutions, the Court noted, "might be devised by Congress or the States in the exercise of their creative rule-making capacities" (*ibid.*). However, the Court stated, until such "potential alternatives for protecting the privilege" are devised by Congress and the States (*ibid.*), a person must be warned prior to any in-custody questioning that he has a right to remain silent, that any-

thing he says can be used against him in court, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning (*id.*, at 444, 479). The warnings are thus "procedural safeguards." *Id.*, at 444, 478; see *id.*, at 467.

The core of the *Miranda* decision is that, in order for a statement by an accused who has been questioned in police custody to be considered free from any form of compelling influence, it must have been made with the understanding on the part of the accused that he did not have to speak at all. The specific warnings enunciated by the decision constitute a means, suggested by the Court, by which the accused's Fifth Amendment privilege may be safeguarded in the custodial situation. It was *some* "system" to safeguard against inherently compulsive circumstances which the Court found necessary under the Constitution; it did not find a *particular* system necessary. The effect of the statute, in our view, is to instruct the courts that exact compliance with *Miranda* is not the only means by which the requirements of the privilege can be said to have been met. Section 3501(b) directs district court judges to look to "all the circumstances surrounding the giving of the confession" in determining whether a breach of a protective measure resulted in an actual breach of the privilege itself. If it did not, the confession is admissible even if a particular aspect of the *Miranda* warnings was not fully complied with. Since those specific warnings are not themselves constitutional absolutes, the determination by Congress—that their absence in a case should not entail an inflexible imposition of the exclusionary rule—is within the power of Congress. The Court stated in *Miranda* that "[w]here rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." 384 U. S. at 491. Clearly the Court was referring to the privilege, not the delineated

means of protecting it. In the same paragraph, the Court emphasized that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation." *Id.*, at 490; see *id.*, at 467.

In short, while the Court in *Miranda* tried to set forth a set of rules which would avoid the necessity of considering all the circumstances of a particular case,* Congress has, in effect, told the courts that it does want the cases considered on an individualized basis. "The rigid, mechanical exclusion of an otherwise voluntary and competent confession," the Senate Committee on the Judiciary stated, "is a very high price to pay for a 'constable's blunder.'" S. Rep. No. 1097, 90th Cong., 2d Sess. 38 (1968). The statute, however, clearly recognizes that a statement must be voluntary in the sense that it must not only be free of physical coercion, but must be made with awareness of the individual's Fifth Amendment rights; the statute does not abrogate constitutional rights. Congress has reasonably directed that an inflexible exclusionary rule

---

* It was in this context that the Court characterized the expedient of giving "a warning as to the availability of the privilege" as so simple that it would not "pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." **Id.**, at 468. The "system," the Court felt, should require giving this warning even to a person who might be presumed to know of the right. It was this aspect of the **Miranda** holding—that even a lawyer would have to be warned under this system—that apparently prompted the Senate sponsors to specify as a factor in the district court's assessment of voluntariness under 3501(b) "whether or not such a defendant was advised **or knew** that he was not required to make any statement" (emphasis added). See **e.g.**, 114 Cong. Rec. S. 5007 (daily ed., May 6, 1968). While this does not change the necessity of giving this warning even to a lawyer under the "system" currently in effect, it does indicate that the reason for the phrase "or knew" is the conclusion by Congress that **obvious** knowledge is logically equatable with a warning in this situation. In light of this background, and in light of the overall import of the entire section, this phrase cannot properly be read as indicating that a district court could find a statement free from inherently compulsory influences when elicited from a person who was in fact totally unaware that he need not make a statement.

be applied only where the constitutional privilege itself has been violated, but not where a protective safeguard system suggested by the Court has been violated in a particular case without affecting the privilege itself. The determination of Congress that an inflexible exclusionary rule is unnecessary is within its constitutional power.**

That is not to suggest that this Court is without the power to state appropriate constitutional standards for the taking of confessions as for all other questions in which the Pennsylvania state courts are called upon to decide such questions. But the Pennsylvania courts are certainly not bound to accept blindly a series of requirements laid down by the United States Supreme Court before the passage of the Omnibus Crime Control and Safe Streets Act and thereafter repudiated by a co-equal branch of the Federal Government in that Act. In this respect it should be remembered that the *Miranda* warnings made it clear that there was nothing sacred in the specific rules which it articulated but, rather, that those warnings or other equivalent protections must be guaranteed to defendant. It is in this context that this Court is requested to repudiate a doctrinaire legal interpretation of *Miranda* in favor of a more flexible approach, as outlined in the Omnibus Crime Control Act.

** The English practice is comparable. Although a warning is required under the Judges' Rules, a failure to give the warning in a particular case will not necessarily result in exclusion from evidence of a resulting statement; the matter lies within the discretion of the court. See Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1091, 1093-1094 (1966).